Indian Claims Commission

'N**a**mgis First Nation

Report on: McKenna-McBride Applications Inquiry

February 1997

Indian Claims Commission

Commission des revendications des Indiens

102-02639/

February 6, 1997

Chief and Council
’Na̱mgis First Nation

The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

Re: ’Na̱mgis First Nation
McKenna-McBride Applications Claim

In a letter dated November 4, 1994, Mr. Stan Ashcroft, legal counsel for the ’Na̱mgis First Nation, initiated proceedings before the Indian Claims Commission by requesting an inquiry into the McKenna-McBride Applications Claim. On March 3, 1995, the Commission notified the Government of Canada and the Chief and Council of the ’Na̱mgis First Nation that it would conduct an inquiry into Canada’s rejection of the specific claim of this First Nation.

In the course of this inquiry, the Commission reviewed hundreds of historical documents related to the specific claim. In addition, the Commission held an information-gathering session at Alert Bay on April 20 and 21, 1995, where we heard directly from elders of the ’Na̱mgis First Nation. Finally, we heard oral submissions from counsel for the parties on the legal issues raised in this inquiry on September 20, 1995, in Vancouver.

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Our review of the history of this claim, and our analysis, findings, and recommendations are contained in the attached report which we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

Daniel Bellegarde A. Gill

P.E. James Prentice, QC
Commission Co-Chair

Daniel J. Bellegarde
Commission Co-Chair

Aurélien Gill
Commissioner

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE MCKENNA-MCBRIDE APPLICATIONS CLAIM OF THE 'NAMGIS FIRST NATION

PANEL

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February 1997

CONTENTS

EXECUTIVE SUMMARY v

PART I INTRODUCTION 1

MANDATE OF THE INDIAN CLAIMS COMMISSION 3
THE SPECIFIC CLAIMS POLICY 4
THE COMMISSION'S REPORT 6

PART II THE INQUIRY 11

THE CLAIMANT AND THE CLAIM AREA 7
    Map of Claim Area 8
HISTORICAL BACKGROUND 9
    McKenna-McBride Commission 12
    Role of the Indian Agent 16
    Indian Agent Halliday and the McKenna-McBride Commission 18
    McKenna-McBride Commission and the Kwawkewlth Agency 20
    McKenna-McBride Commission and the Nimpkish Band 24
    McKenna-McBride Commission's Recommendations for Additional Lands 34
ORAL HISTORY 41
    Application 73: Woss 41
    Applications 76 and 77: Plumper and Pearse Islands 45
    Indian Agent Halliday 47

PART III ISSUES 51

FIDUCIARY DUTY 51
NEGLIGENCE 51
SPECIFIC CLAIMS POLICY 52

PART IV ANALYSIS 53

FIDUCIARY DUTY 53
  Issue 1 53
    Submissions of the Parties 53
    Public versus Private Law Duty 60
    Nature and Scope of Fiduciary Obligations 61
    Fiduciary Duty prior to the McKenna-McBride Hearings 67
    Fiduciary Duty during the McKenna-McBride Hearings 74
    Fiduciary Duty after the McKenna-McBride Hearings 80
  Issue 2 81
NEGLIGENCE 89
  Issue 3 89
  Issue 4 89
  Issue 5 90
SPECIFIC CLAIMS POLICY 90
  Issue 6 90

PART V FINDINGS AND RECOMMENDATIONS 95

FINDINGS 95
  Fiduciary Duty prior to the McKenna-McBride Hearings 95
  Fiduciary Duty during the McKenna-McBride Hearings 97
  Fiduciary Duty after the McKenna-McBride Hearings 98
  Fiduciary Duty of the McKenna-McBride Commission and Its Agents 99
  Scope of the Specific Claims Policy 100
RECOMMENDATIONS 101

APPENDICES

A 'Namgis First Nation McKenna-McBride Applications Claim Inquiry 103
B The Potlatch and Indian Agent Halliday 104

EXECUTIVE SUMMARY

BACKGROUND

In September 1912 an agreement was negotiated between representatives of both the federal and British Columbia governments to establish the Royal Commission on Indian Affairs for the Province of British Columbia (the McKenna-McBride Commission). The Commission had power, subject to approval from the two levels of government, to adjust the acreage of Indian reserves in British Columbia. As part of its operations, the Commission travelled throughout the province meeting with representatives from the various tribes and bands.

On Monday, June 1, 1914, the McKenna-McBride Commission met with representatives of the principal tribes of the Kwawkewlth Nation. It quickly became apparent that the tribes were not adequately prepared for the meeting. Several of the Chiefs stated that they had received the plans of their lands only a short time earlier. The Chairman of the Commission noted that the plans had been lying in the office of the Indian Agent, W.M. Halliday, who had failed to distribute them to the tribes as he ought to have done.

The following day, the Commission met specifically with the Nimpkish Band (now known as the 'Namgis First Nation). Chief Lageuse submitted seven applications for additional reserve lands (later numbered 72 through 78). Included in these applications was a request for 100 acres in the area around Woss (Application 73), three large islands in the Plumper Island group (Application 76), and all of the islands in the Pearse Island group (Application 77). These three applications are at issue in this inquiry.

On June 24, 1914, the Commission met separately with Agent Halliday in Victoria, where he was asked to provide his recommendations in relation to the land applications from the Kwawkewlth Agency. With regard to the seven applications put forward by the Nimpkish Band, Agent Halliday recommended "that the application for Plumper Islands be granted, with a maximum allowance of 100 acres," and "that the smaller Islands of the [Pearse] group, lying on the eastern side and containing fifty or sixty acres be granted." He also recommended that 500 acres of Application 72 (extension of Indian Reserve 3) be granted, although he noted that the land was apparently covered by a timber limit. Agent Halliday recommended that the remaining four applications be rejected. With respect to Application 73 at Woss, Agent Halliday stated that "the land was so isolated that it would never be used."

A few months later, in October 1914, the Commission dispatched Mr. Ashdown Green, variously described as technical officer and surveyor to the Commission, to Alert Bay. He visited both the Plumper and Pearse Island groups in one day and, in his report, provided details regarding the most southwesterly island of the Plumper group, containing "about 70 acres," and the most northeasterly island of the Pearse group containing "about 60 acres."

By the summer of 1915 it was apparent to the Commission that much of the land requested by the Kwawkewlth tribes was alienated and unavailable. As a result, the Secretary to the Commission wrote to Agent Halliday on July 28, 1915, asking him if he wished to reconsider some of the applications that he had originally rejected. Agent Halliday responded that, since Application 72 had been rejected, he strongly recommended that the Nimpkish be given all the Pearse Islands, except the large island lying to the southwest of the group.

The Commission issued its final report on Indian affairs in British Columbia on June 30, 1916. It allowed Applications 76 and 77 in part and ordered the creation of two new reserves for the "Nimkeesh Tribe": Ksui-la-das Island, the southwesterly island of the Plumper group, containing an area of approximately 70 acres; and Kuldekduma Island, the most northerly of the Kuldekduma or Pearse group, containing an area of approximately 60 acres. The Commission rejected Application 73 at Woss on the ground that it was "not reasonably required."

ISSUES BEFORE THE COMMISSION

Fiduciary Duty

1 Did Indian Agent Halliday owe a fiduciary duty to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands? If so, did he breach that duty in relation to:

a) Application 73
b) Application 76
c) Application 77

2 Did the McKenna McBride Commission or its agent Ashdown Green owe a fiduciary duty to the Band in relation to their deliberations and investigations with respect to the Band's applications for additional reserve lands? If so, did they breach that duty in relation to:

a) Application 73
b) Application 76
c) Application 77

Negligence

3 Did Indian Agent Halliday owe a duty of care to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands?

4 If so, was Indian Agent Halliday negligent in failing to fulfil that duty in relation to:

a) Application 73
b) Application 76
c) Application 77

5 If Indian Agent Halliday was negligent, did his actions or inaction cause the loss of the lands sought by the Band pursuant to:

a) Application 73
b) Application 76
c) Application 77

Specific Claims Policy

6 Does this claim fit within the parameters of the Specific Claims Policy?

CONCLUSIONS

Issue 1

Fiduciary Duty prior to the McKenna-McBride Hearings

Prior to the McKenna-McBride hearings, Agent Halliday had a fiduciary obligation to prepare the Band for the process by providing basic information and advice. A failure to do so was a breach of that obligation. We are mindful, however, that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. Therefore, if all alternative lands were alienated, the Band probably would not have fared any better in the process even if Agent Halliday had provided basic information and advice.

Bearing in mind the constraints on the McKenna-McBride Commission with respect to alienated lands, we propose the following guidelines for determining whether or not the Band has a valid specific claim against Canada as a result of the Indian Agent's conduct prior to the McKenna-McBride hearings. In our view, the Band has a valid specific claim if it can establish a *prima facie* case that (1) the Indian Agent failed to prepare the Band for the McKenna-McBride process; (2) unalienated lands were available which the Band could have applied for; and (3) the lands were reasonably required by the Band. If these conditions are satisfied, it should be presumed that the Commission would have allotted the lands as additional reserve lands. Although the presumption is rebuttable, the onus should be on Canada to demonstrate on a balance of probabilities that the McKenna-McBride Commission would not have allotted the lands as additional reserve lands if the lands had been requested by the Band.

In the circumstances of this claim, we are satisfied that Agent Halliday failed to disclose material information and to provide basic advice to the Nimpkish Band to assist it in its preparations for the McKenna-McBride hearings. Although this information was readily available to Agent Halliday and would not have been an onerous task on his part, he offered little or no information to the Band to assist it during this important process. This failure was evident from the words of both Chief Willie Harris, at the general meeting of the principal tribes on June 1, 1914, and the Chairman of the McKenna-McBride Commission, who noted that the plans of the Chiefs' lands were "lying in the office of the Indian Agent who failed to distribute them . . . as ought to have been done."

We are also satisfied that additional lands were reasonably required by the Band. Compared with a per capita average of 14.03 acres for the Kwawkewlth Agency as a whole, the Nimpkish had a per capita average of only 4.2 acres, even after receiving 70 additional acres in the Plumper Island group and 60 additional acres in the Pearse Island group. Considering that the Nimpkish Band "was one of the few in the Agency increasing numerically . . . and required room for expansion," it seems reasonable to conclude that the Band was left with insufficient lands.

It is unclear, however, whether there were unalienated lands available in 1914 which the Band could have applied for. Since, on the evidence before us, the Band has not established a *prima facie* case that such lands were available, in our view it has not established that it has a valid specific claim on this basis. If supplementary research can confirm that such lands were available in 1914, it should be presumed that the McKenna-McBride Commission would have allotted additional reserve lands. Although it is not clear how much land the Commission would have allotted to the Band in 1914, this is a matter which could provide a valid basis for negotiations under the Specific Claims Policy.

Fiduciary Duty during the McKenna-McBride Hearings

During the McKenna-McBride hearings, Agent Halliday had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission. In our view, Agent Halliday's failure to consult with the Band and make appropriate investigations into its present and future land needs constitutes a breach of the Agent's fiduciary obligation. As before, however, we are mindful that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. We therefore propose the following guidelines for determining whether or not the Band has a valid specific claim against Canada as a result of the Indian Agent's conduct during the McKenna-McBride hearings. The Band has a valid specific claim if it can establish a *prima facie* case that (1) a reasonable person acting in good faith would have provided a different recommendation to the Commission than that provided by the Indian Agent if that person had consulted with the Band and made other appropriate investigations; and (2) the relevant lands were unalienated. If these conditions are satisfied, it should be presumed that the Commission would have allotted some or all of the lands encompassed by that different recommendation, providing that the lands were reasonably required by the Band. The onus is on Canada to rebut the presumption on a balance of probabilities.

On the basis of the evidence before us, we are of the view that, if Agent Halliday had consulted with the Band before making his recommendations to the Commission, he would have discovered that all the lands encompassed by Application 76 (the Plumper Islands) and Application 77 (the Pearse Islands) were actively used by the Band and were of importance to them. We therefore find that a reasonable person acting in good faith would have recommended for reserve status all the islands requested by the Band. According to the notations made by the Commission, all the lands encompassed by Application 76 were "open and available." Accordingly, it should be presumed that the Commission would have allotted some or all of the two Plumper islands that were not included in its final decision. The Commission's notations with respect to Application 77 state that the lands were "*partially* open and available." Again, the Band has not provided sufficient evidence that the particular lands sought in its specific claim in relation to Application 77 were unalienated. This is a necessary precondition before it can be presumed that the Commission would have allotted some or all of the lands as additional reserve lands.

The situation with respect to Application 73 (Woss) is more complex. Given the evidence of Chief Lageuse that the area around Woss had not been used for a number of years, we can see why a reasonable person acting in good faith might have made the same recommendation as Agent Halliday if it was absolutely clear that the Commission would allot the lands sought under Application 72 to extend the area of Indian Reserve 3. However, this outcome was not at all clear, since the lands requested under Application 72 were covered by a timber limit. The area around Woss was an old village site, important for food gathering and trade, and significant in terms of 'Namgis culture and traditions; it is a reasonable likelihood that the Band would have used the area since it was unable to obtain the lands sought under Application 72. Therefore, a reasonable person acting in good faith would have recommended Application 73 at Woss in addition to, or at least in the alternative to, Application 72. However, it is unclear whether the lands encompassed by Application 73 were unalienated. If it can be shown that the lands were unalienated, it should be presumed that the Commission would have allotted some or all of them as additional reserve lands.

Fiduciary Duty after the McKenna-McBride Hearings

When the McKenna-McBride Commission returned to Agent Halliday after the hearings and asked if he wished to reconsider his opinion with regard to any of the applications he had not endorsed, we are of the view that Agent Halliday had, at the very least, the same fiduciary obligation as he had during the hearings; that is, he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission.

In the circumstances of this claim, Agent Halliday knew at the time he was making his revised recommendations that the Commission was unwilling or unable to allot the lands encompassed by Application 72. Since Agent Halliday believed that the Band required room for expansion, a reasonable person would have attempted to match as closely as possible the lost acreage from Application 72 (500 acres). In terms of the Band's original applications, this acreage would have required a revised recommendation that included all or most of Applications 73, 76, and 77, depending on the total acreage in the Plumper and Pearse Island groups. Therefore, it should be presumed that the Band has a valid claim for negotiation with respect to Application 76 since the lands were "open and available." The same should be presumed with respect to Applications 73 and 77 if the Band can provide evidence that the lands sought in its specific claim were unalienated.

It is unnecessary for us to decide whether Agent Halliday was restricted to the original applications of the Band when he made his revised recommendations for any such restriction would simply return us full circle to his obligation to prepare the Band for the process. If the Band had been properly prepared for the process and had asked for more available lands, Agent Halliday would have had a larger land base from which to make his revised recommendations.

Issue 2

Fiduciary Duty of the McKenna-McBride Commission and Its Agents

In *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at 147 (SCC), Mr. Justice Iacobucci stated that "[t]he courts must be careful not to compromise the independence of *quasi*-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty." Although commissions of inquiry set up under Part I of the *Inquiries Act* (such as the McKenna-McBride

Commission) are not courts and are not, generally speaking, quasi-judicial tribunals, there is substantial support for the position that they are independent bodies. Therefore, in our view, the reasoning of Mr. Justice Iacobucci can logically be extended to a commission such as the McKenna-McBride Commission. Accordingly, we find that the McKenna-McBride Commission and its agent, Ashdown Green, did not owe a fiduciary duty to the Band.

Issues 3, 4, and 5

Negligence of Indian Agent Halliday

Issues 3, 4, and 5 all deal with the First Nation's alternative claim that Agent Halliday was negligent in failing to protect and further the best interests of the Band. Given our findings and conclusions with respect to fiduciary duty in Issue 1, we do not find it necessary to consider these issues.

Issue 6

Scope of the Specific Claims Policy

As we discussed at some length in our report into the Cormorant Island claim of the 'Namgis First Nation, in our view the four enumerated circumstances of "lawful obligation" on page 20 of *Outstanding Business* are only examples of Canada's lawful obligations and are not intended to be exhaustive. More specifically, Canada's fiduciary obligations are "lawful obligations" within the meaning of the Policy.

As we see it, a claim falls within the Specific Claims Policy if (1) it is based on a cause of action recognized by the courts; (2) it is not based on unextinguished aboriginal rights or title; and (3) it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy. If these conditions are met, Canada should consider the claim under the Policy in the interests of avoiding protracted, costly, and adversarial court actions.

Given our conclusion in Issue 1 that Agent Halliday breached his fiduciary obligation to the Band, we find that this claim fits within the parameters of the Specific Claims Policy.

RECOMMENDATIONS

Given our findings and conclusions as summarized above, we make the following recommendations to the parties:

1 **That the McKenna-McBride Applications Claim of the 'Namgis First Nation, with respect to lands included in Application 76 only, be accepted for negotiation under the Specific Claims Policy.**

2 **That the 'Namgis First Nation's claims related to Applications 73 and 77 not be accepted for negotiation under the Specific Claims Policy.**

3 **That the 'Namgis First Nation and Canada conduct further research to determine whether there were unalienated lands available which the Band could have applied for during the 1914 McKenna-McBride hearings. Specific research should also be conducted with respect to lands included in Applications 73 and 77 to determine whether such lands were unalienated and available. At the request of the parties, the Commission is willing to offer its assistance in the completion of additional research.**

PART I

INTRODUCTION

In June 1914 representatives from the Nimpkish Band, now known as the 'Na̲mgis First Nation, attended hearings before the Royal Commission on Indian Affairs for the Province of British Columbia (the McKenna-McBride Commission). The McKenna-McBride Commission was jointly created by the Government of Canada and British Columbia to resolve a number of disputes over the allocation of Indian reserves in the province. During the McKenna-McBride hearings, the Nimpkish Band presented seven applications for additional reserve lands. Of these seven applications, four were rejected because they contained areas that were already alienated, two were approved in part, and one was rejected outright because it was deemed to have exceeded what was reasonably required by the Band. All the applications were considered in light of the opinion of the local Indian Agent, William Halliday.

On September 3, 1987, Chief Pat Alfred submitted Band Council Resolutions for four specific claims to the Office of Native Claims (now the Specific Claims Branch of the Department of Indian Affairs and Northern Development). One of these claims related to the rejection, or partial rejection, of three of the applications for additional reserve lands which the Nimpkish Band had presented to the McKenna-McBride Commission in June 1914.[1] The First Nation contended that Canada's officials owed a fiduciary obligation or duty of care in relation to the applications for reserve land and that these duties were not properly discharged. As will be discussed more fully below in Part II, the relevant applications were numbered 73, 76, and 77.

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[1] Chief Pat Alfred, Nimpkish Band Council, to Manfred Klein, Negotiator, Specific Claims, Office of Native Claims, September 3, 1987 (ICC Documents, p. 217).

On February 10, 1994, Nola Landucci, Specific Claims Negotiator, Indian and Northern Affairs Canada, wrote to Stan Ashcroft, legal counsel for the First Nation, advising that Canada had decided to reject the claim:

> Further to our recent discussions concerning the extent to which Canada is prepared to negotiate the above claim based on the Nimpkish Band's submissions, please be advised that we are not prepared to recommend that Applications #76 & 77 be accepted for negotiation. Canada's position is that the evidence and submissions provided are not sufficient to establish that Canada breached its lawful obligation to the Band regarding these Applications.
>
> As you are aware, we were willing to accept Application 73 for negotiation on a limited basis if the acreage referred to in application 73 were available when the McKenna McBride Commission was making its decisions. Our subsequent research indicates that these lands were not available at that time.
>
> However, we are prepared to review any further evidence which the Band may wish to present indicating that the Band would have proposed alternative available lands to the Commission in lieu of the Application 73 lands. I must advise you, however, that without further evidence, we are also rejecting Application 73.[2]

By letter dated November 4, 1994, Mr. Ashcroft, on the instructions of the Chief and Council of the 'Na̱mg̱is First Nation, submitted the "McKenna-McBride or Royal Commission Specific Claim" to the Indian Claims Commission (ICC) "for appeal purposes."[3] A planning conference was held on January 31, 1995, followed by the Commissioners' review of the request in early March 1995. On March 3,

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[2] Nola Landucci, Specific Claims Negotiator, Indian and Northern Affairs Canada, to Stan Ashcroft, February 10, 1994 (ICC Documents, p. 218).

[3] Stan H. Ashcroft to Kim Fullerton, Chief Legal Counsel, Indian Claims Commission, November 4, 1994 (ICC file 2109-05-1).

1995, Commission Co-Chairs Daniel Bellegarde and James Prentice wrote to the Chief and Council of the First Nation, the Honourable Ron Irwin, Minister of Indian and Northern Affairs, and the Honourable Allan Rock, Minister of Justice and Attorney General, advising that the Commissioners had agreed to conduct an inquiry into Canada's rejection of the claim.[4]

For clarification, the ICC has already conducted a separate inquiry into the Cormorant Island claim of the 'Namgis First Nation.[5] That claim dealt with an 1880 reserve allotment encompassing almost the whole of Cormorant Island. In that inquiry, we concluded that Canada had an outstanding lawful obligation to the 'Namgis First Nation as a result of its failure to refer the province's disallowance of the reserve allotment to a judge of the British Columbia Supreme Court for a determination of the issue. In this inquiry, we are asked to consider whether Canada has a separate outstanding lawful obligation as a result of certain events that transpired several years later during the investigations and deliberations of the McKenna-McBride Commission.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of the ICC to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued under the Great Seal to the Commissioners on September 1, 1992. It directs:

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[4] Daniel Bellegarde and James Prentice, Co-Chairs, to Chief and Council, Nimpkish Indian Band, and to the Ministers of Indian and Northern Affairs and Justice, March 3, 1995 (ICC file 2109-05-1).

[5] The findings and recommendations of the Commission in regard to this claim are set out in the report entitled *'Namgis First Nation Report on Cormorant Island Inquiry* (March 1996).

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination on the applicable criteria.[6]

This is an inquiry into the rejected claim of the 'Namgis First Nation, formerly known as the Nimpkish Indian Band.

THE SPECIFIC CLAIMS POLICY

The ICC is directed to report on the validity of rejected claims "on the basis of Canada's Specific Claims Policy." That policy is set forth in a 1982 booklet published by the Department of Indian Affairs entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[7] Unless expressly stated otherwise, references to the Policy in this report are to *Outstanding Business*.

Although the ICC is directed to look at the entire Specific Claims Policy in its review of rejected claims, legal counsel for Canada drew our attention to three passages in particular.[8] First, the opening sentence in *Outstanding Business*:

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[6] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[7] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982) [hereinafter cited as *Outstanding Business*].

> The claims referred to in this booklet deal with specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets.[9]

Second, the definition of the term "specific claims" on page 19 of the Policy:

> As noted earlier the term "specific claims" refers to claims made by Indians against the federal government which relate to the administration of land and other Indian assets and to the fulfillment of Indian treaties.[10]

Third, the discussion of the concept of "lawful obligation" on page 20:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.

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[8] Submissions on Behalf of the Government of Canada, September 6, 1995, pp. 11-12.

[9] *Outstanding Business*, 3.

[10] *Outstanding Business*, 19.

iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
iv) An illegal disposition of Indian land.[11]

It is Canada's position that this claim does not fall within the scope of the Specific Claims Policy. We will address this issue in Part IV below.

THE COMMISSION'S REPORT

This report sets out our findings and recommendations to the First Nation and to Canada. Part II of the report summarizes the facts disclosed in the inquiry and the historical background for the claim; Part III sets out the relevant legal issues addressed by the parties; Part IV contains our analysis of the facts and the law; and Part V provides a succinct statement of our findings and recommendations.

As in the Cormorant Island inquiry, we wish to thank legal counsel for the First Nation and for Canada for their assistance throughout the inquiry process, and we also wish to express our sincere gratitude to the people of the 'Namgis First Nation for their hospitality during our visit to their community.

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[11] *Outstanding Business*, 20.

PART II

THE INQUIRY

In this part of the report, we examine the historical evidence relevant to the claim of the 'Namgis First Nation. Our investigation into this claim included the review of one volume of documents submitted by the parties as well as several exhibits and supplementary submissions. In addition, the ICC held an information-gathering session in the community of Alert Bay, British Columbia, on April 20 and 21, 1995, where we heard evidence from six witnesses. On September 20, 1995, legal counsel for both parties made oral submissions in Vancouver, British Columbia. Details of the inquiry process and the formal record of documents and evidence considered in this inquiry can be found in Appendix A.

THE CLAIMANT AND THE CLAIM AREA

The people of the 'Namgis First Nation are part of the Kwakwaka'wakw, which is the Kwak'wala language group.[12] Their traditional territory is on the northeastern coast of Vancouver Island, bounded by the watershed of the Nimpkish River and the adjacent marine environment. This particular claim relates to lands in the Plumper and Pearse Island groups and in the area around Woss. Map 1 on page 8 shows the relevant area of British Columbia and identifies a number of specific sites that are of particular importance in this claim.

The 'Namgis First Nation has, historically, been referred to by several names, including Nimkeesh, Nimkish, and Nimpkish. In their written and oral submissions, legal counsel for both parties referred to the claimant predominantly

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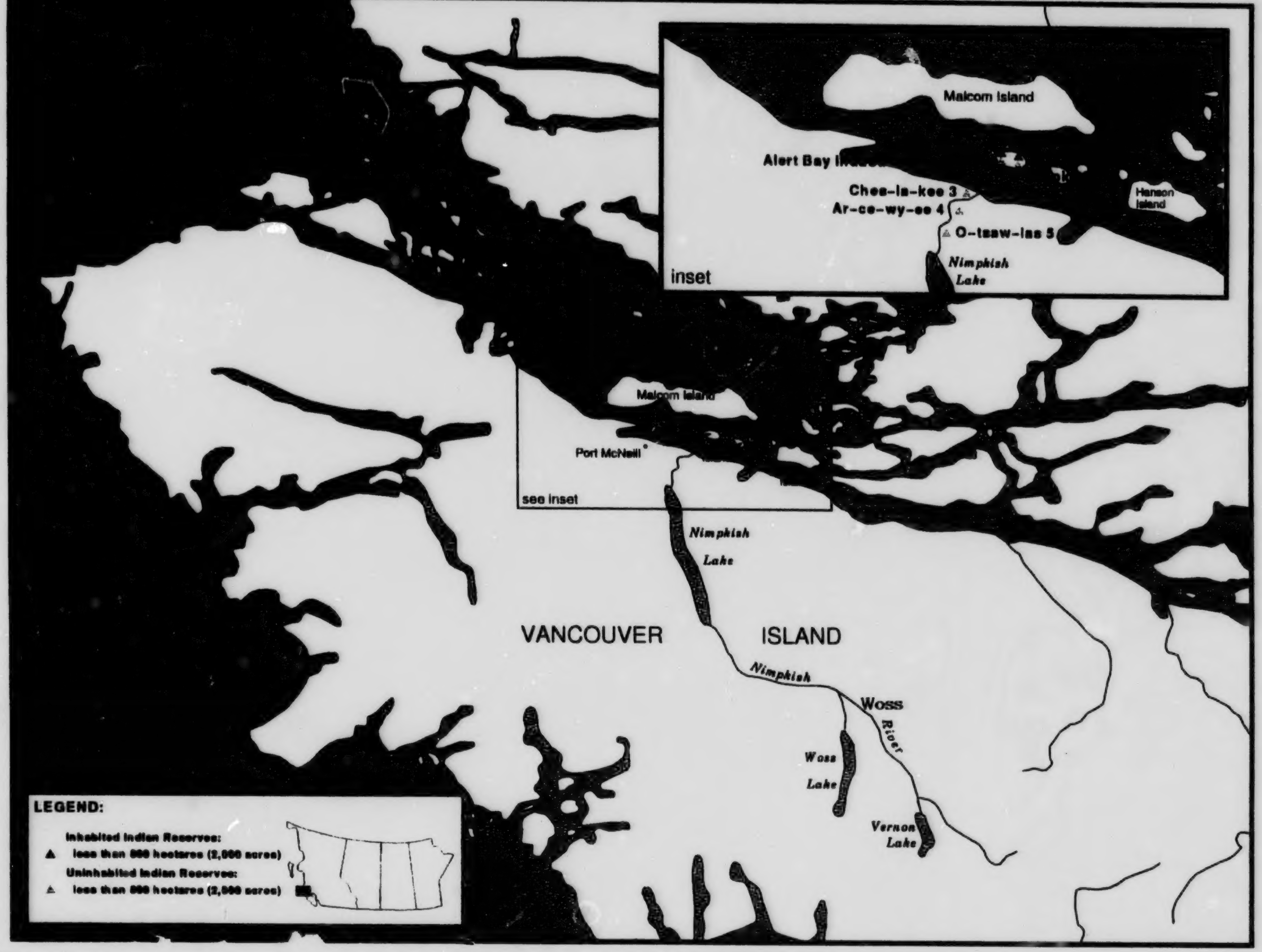
[12] Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 14.


Malcom Island
Alert Bay
Chee-la-kee 3
Ar-ce-wy-ee 4
O-tsaw-las 5
Hanson Island
Nimpkish Lake
inset
Malcom Island
Port McNeill
see inset
Nimpkish Lake
VANCOUVER ISLAND
Nimpkish
Woss River
Woss Lake
Vernon Lake
LEGEND:
Inhabited Indian Reserves:
▲ less than 800 hectares (2,000 acres)
Uninhabited Indian Reserves:
△ less than 800 hectares (2,000 acres)

as the "Band" rather than the "First Nation." These terms will be used interchangeably throughout this report depending on the context. However, once again, we wish to emphasize and acknowledge that the claimant is now known as the 'Namgis First Nation.

HISTORICAL BACKGROUND

Apart from small areas of land in the northeast corner of the province and around Victoria on Vancouver Island, no major treaties have been signed with the First Nations of British Columbia. The absence of treaties has contributed to British Columbia's long and, at times, contentious history in relation to the allocation of reserve lands. Even before the turn of the century, differences of opinion over the needs of the province's native population strained relations between British Columbia and Canada. As a result, a number of joint commissions were created, each with the hope that it would be able to find a solution to what was termed the "Indian land question" in British Columbia.

The first Indian Reserve Commission was created in 1875 and was a response to the acrimony over Indian issues that had evolved since British Columbia's union with Canada in 1871. When representatives from British Columbia negotiated the colony's entry into Confederation, they argued for the inclusion of a special clause in the Terms of Union which would ultimately have a long-lasting impact on the evolution of Indian land policy in the new province. This clause, Article 13, stated:

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that

> hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the colonies.[13]

Given the ambiguous wording contained in Article 13, it is hardly surprising that the Indian land question would prove to be one of the more contentious issues between the two levels of government. The dominion government sought to have reserve size set at an average of 80 acres per family, while the province fought to limit the acreage to 10 acres per family - an amount, it argued, that continued its "liberal" pre-Confederation policy. Ultimately, the two levels of government agreed on a compromise figure of 20 acres per family but, when the province insisted that this amount apply only to future reserves, the fragile agreement collapsed.[14] In 1875, acting on a proposal put forward by William Duncan, an influential missionary based in Metlakatla, Canada and British Columbia agreed to the formation of a Joint Reserve Commission to address the matter of Indian reserve allotment in British Columbia. The original Joint Reserve Commission consisted of three members, but it was soon dissolved. In its stead, G.M. Sproat was appointed sole Reserve Commissioner in 1878.[15]

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[13] RSC 1985, App. II, No. 10, in Jack Woodward, *Native Law* (Scarborough: Carswell, 1994), 234-35.

[14] Robin Fisher, *Contact and Conflict*, 2d ed. (Vancouver: UBC Press, 1992), 182-83; Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: General Publishing, 1972), 183.

Commissioner Sproat visited the Nimpkish in 1879. On January 2, 1880, he issued a Minute of Decision reserving almost the whole of Cormorant Island (an area comprising approximately 1500 to 1600 acres of land) for their use. The reserve allotted by Commissioner Sproat met with considerable opposition and was disallowed by the provincial government.[16] In the autumn of 1884 his successor, Commissioner Peter O'Reilly, travelled to Cormorant Island to review the Band's need for reserve land. In Minutes of Decision dated October 20, 1884, Commissioner O'Reilly allotted two reserves on Cormorant Island. The first was at Alert Bay, comprising 50 acres, and the second was a small graveyard, comprising two acres, located close to the reserve at Alert Bay. This allotment gave the Nimpkish a total reserve acreage of 52 acres.

Commissioner O'Reilly visited the Nimpkish again in 1886, at which time he allotted an additional three reserves. By Minutes of Decision dated September 21, 1886, he allotted:

IR 3: Ches-la-kee, a reserve of 335 acres situated at the mouth of the Nimkeesh River, Broughton Strait.

IR 4: Ar-ce-wy-ee, a reserve of 42 acres situated on the left bank of the Nimkeesh River, about 2 1/2 miles from its mouth.

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[15] Robin Fisher, *Contact and Conflict,* 2d ed. (Vancouver: UBC Press, 1992), 188-94.

[16] See Indian Claims Commission, *'Ngmgis First Nation Report on Cormorant Island Inquiry* (March 1996), for an examination of the facts and issues involved in that claim.

IR 5: O-tsaw-las, a reserve of 50 acres situated on the right bank of the Nimkeesh River, 1/2 mile from the outlet of Karwutseu Lake.[17]

The Indian Reserve Commission remained in operation until 1908, at which time its work was brought to an abrupt halt by the province.[18]

McKenna-McBride Commission

In the period after the province's decision to withdraw from the Reserve Commission process, pressure continued to mount for a full and proper settlement of the controversy surrounding Indian land rights. It was finally decided that a Royal Commission would be the best method of finding a solution acceptable to both levels of government.[19] The resulting commission was based on an agreement negotiated in 1912 between J.A.J. McKenna, Special Commissioner appointed by the dominion government to investigate the condition of Indian Affairs in British Columbia, and the Honourable Sir Richard McBride, Premier of British Columbia.

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[17] P. O'Reilly, Indian Reserve Commissioner, Minutes of Decision, September 21, 1886. There are discrepancies between the acreage figures set out in Commissioner O'Reilly's Minutes of Decision and the figures appearing in subsequent documentation. The 1913 Schedule of Indian Reserves lists the following acreage figures for the five reserves:

1 Alert Bay . . . 46.25 (acres)
2 Burial ground . . . 1.87
3 Ches-la-kee . . . 302.87
4 Ar-ce-wy-ee . . . 41.30
5 O-tsaw-las . . . 53.25

These figures are consistent with those confirmed in the Minutes of Decision of the Royal Commission on Indian Affairs for the Province of British Columbia on August 14, 1914. See, Minutes of Decision, Royal Commission on Indian Affairs for the Province of British Columbia, August 14, 1914 (ICC Documents, p. 163).

[18] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974), 227.

[19] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974), 232-34.

The purpose of the McKenna-McBride Agreement was "to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia."[20] It was proposed that the Commission be composed of five members: two commissioners named by Canada, two commissioners named by British Columbia, and one chairman selected by the four named commissioners. The powers of the Commission in relation to the settlement of land issues were defined as follows:

> 2. The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:
>
> (*a*) At such places as the Commissioners are satisfied that more land is included in any particular Reserve as now defined than is reasonably required for the use of the Indians of that tribe or locality, the Reserve shall, with the consent of the Indians, as required by the *Indian Act*, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians.
>
> (*b*) At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside

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[20] McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 47-48). See also the preamble of the *Indian Affairs Settlement Act*, SBC 1919, c. 32, and *The British Columbia Indian Lands Settlement Act*, SC 1920, c. 51.

> land for any Band of Indians for whom land has not already been reserved.[21]

With regard to the creation of reserves, the Agreement called for the province to "take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians."[22] As an interim measure to assist the Commissioners in their task, section 8 of the Agreement provided:

> 8. Until the final report of the Commission is made, the Province shall withhold from pre-emption or sale any lands over which they have a disposing power and which have been heretofore applied for by the Dominion as additional Indian Reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians. . . .[23]

The McKenna-McBride Agreement was formally approved by a federal Order in Council dated November 27, 1912, subject to the further provision that:

> notwithstanding anything in the Agreement contained, the acts and proceedings of the Commission shall be subject to the approval of the two Governments, and that the Governments agree to consider favourably the Reports, whether final or interim, of the Commission, with a view to give effect, as far as reasonably may be, to the acts, proceedings and recommendations of the Commission, and to take all such steps and proceedings as may be reasonably necessary with the

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[21] McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 47-48).

[22] McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 47-48).

[23] McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 47-48).

> object of carrying into execution the settlement provided for by the Agreement in accordance with its true intent and purpose.[24]

A concurrent provincial Order in Council was issued on December 31, 1912.[25]

After an initial period of organization, the Royal Commission on Indian Affairs for the Province of British Columbia, also known as the McKenna-McBride Commission, travelled throughout the province meeting with representatives from all the various tribes and bands. At these community meetings, the Commissioners explained the object and scope of the Commission and heard the Indians' views on their land requirements and other topics of concern. Band representatives were typically examined under oath on matters connected with the work of the Commission. The Commissioners were accompanied on their travels by the District Inspectors of the Department of Indian Affairs and the Indian Agents, who provided local knowledge of persons and places.[26]

In addition to hearing testimony from representatives of the individual bands, it was the practice of the Commission after visiting the reserves to call the Inspector of the Agency and the Indian Agent to Victoria to examine them under oath.[27] There is no indication in the record that band members were present at these meetings.[28]

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[24] Federal Order in Council, November 27, 1912 (ICC Documents, p. 49).

[25] Provincial Order in Council 1341, December 31, 1912 (ICC Exhibit 6).

[26] General Report, Royal Commission on Indian Affairs for the Province of British Columbia, p. 18 (ICC Exhibit 6).

[27] Progress Report No. 1, November 26, 1913, contained in General Report, Royal Commission on Indian Affairs for the Province of British Columbia, pp. 145-46 (ICC Exhibit 6).

[28] ICC Transcript, September 20, 1995, pp. 66-67 (Bruce Becker).

The Commission also heard representations from public bodies, such as municipal councils and boards of trade, where friction appeared to exist or where a request for a hearing was made.[29]

Role of the Indian Agent

As is evident from the above description of the Commission's operations, the Commission collected information from many sources, including the Indian Agent. The interest of the Commission in obtaining the Agent's views is understandable when one considers the role he typically played within his agency and the nature of his responsibilities vis-à-vis the bands in the agency.

In British Columbia, as elsewhere in Canada, the Indian Agent had a substantial impact on band affairs and controlled many aspects of the day-to-day lives of the Indians under his jurisdiction. The duties of the Agent were not conclusively defined, but in a memorandum to a newly appointed Agent at Metlakatla, the Indian Superintendent for British Columbia, A.W. Vowell, provided the following instructions:

> INSTRUCTIONS TO INDIAN AGENTS.
>
> The duties of Agents mainly consist in advising the Indians, and in protecting them in the possession of their farming, grazing and woodlands, fisheries or other rights, and preventing trespass upon or interference with the same . . .
>
> . . .
>
> As the Department has no treaty payments to make to the Indians of British Columbia and it proposes doing away entirely with the

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[29] General Report, Royal Commission on Indian Affairs for the Province of British Columbia, p. 18 (ICC Exhibit 6).

> system of giving presents to them there will be little other responsibilities attaching to the position of Indian Agent than the ordinary care of the interests of the Indians, and their protection from wrongs at the hands of those of other nationalties [sic]. The Agent should constantly advise and instruct the Indians in the beneficial use and occupations of their farming, grazing and woodland, fisheries or other privileges or industries possessed or pursued by them; and they, the Agents, should take measures to prevent trespass or intrusion by white people or Indians of other tribes or bands on the reserves, fisheries, etc., within their Agencies, etc. . . .
>
> . . .
>
> Each Agent should make himself acquainted with each individual of the tribe, or tribes, under his charge and to familiarize himself with the special character and habits etc., educational and technical requirements of any kind possessed [by] each member of the tribe or tribes in his Agency.
>
> In order to carry out these instructions it is absolutely necessary that the Agent should make periodical visits to the various bands of Indians in his Agency.[30]

Although the above memorandum was sent specifically to the Indian Agent at Metlakatla, correspondence from Indian Superintendent Vowell to the Secretary of the Department of Indian Affairs in March 1910 confirms that the same instructions were customarily sent to Indian Agents in British Columbia on their appointment.[31]

Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, further outlined the responsibilities of Indian Agents in a set of instructions issued in 1913. In the preface to his instructions, Mr. Scott summarized the duties of the Indian Agent as follows:

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[30] A.W. Vowell, Superintendent of Indian Affairs, British Columbia, to J.A. McIntosh, Indian Agent, covering letter along with memorandum entitled "Instructions to Indian Agents," December 22, 1909 (ICC Documents, pp. 26-27).

[31] A.W. Vowell, Superintendent of Indian Affairs, British Columbia, to Secretary, Department of Indian Affairs, March 17, 1910 (ICC Documents, p. 46).

> TO INDIAN AGENTS, -
>
> These instructions are issued in brief and practical form as an aid to the efficient management of the agencies under the care of Indian Agents in Canada. . . .
>
> The officers of the Department are reminded of their responsibilities as guardians of the Indians entrusted to their immediate care.
>
> It is felt that the very nature of this relation should have the effect of calling forth an Agent's most conscientious endeavours.
>
> While the duty of an Agent is first of all to protect the interests of the Indians under his charge, the rights of the citizens should be respected and the courtesy which is due to the public should always be observed.[32]

These, then, were some of the directives which Indian Agents were instructed to follow in the early 1900s.

Indian Agent Halliday and the McKenna-McBride Commission

When the McKenna-McBride Commission turned its attention to the reserve requirements of the Nimpkish Band, W.M. Halliday had been the Indian Agent for the Kwawkewlth Agency (more or less encompassing the traditional territory of the Nimpkish Band) since 1906. In preparation for the Commission's visit to the Kwawkewlth Agency, J.G.H. Bergeron, Secretary to the Royal Commission, wrote to Agent Halliday on December 19, 1913, requesting that he prepare a tabulated list of the Indian reserves in his Agency.[33] Agent Halliday complied with this request and forwarded his comments to the Royal Commission in early 1914. As a general comment, he noted "that many of the reserves are very small and that the whole acreage of the Agency is very unevenly divided between the different tribes."[34]

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[32] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Indian Agents, October 25, 1913 (ICC Documents, p. 56).

Almost a month later, in February 1914, Agent Halliday was visited by a delegation of Indians. They presented him with a letter, which they wished him to forward to the Department of Indian Affairs in Ottawa. The letter stated:

> We have been informed that the Indian Commission is coming to us in April. Therefore we beg to let you know what our wishes are on this matter.
>
> We have heard that the Commission intend to go to every villiage where there are only a few people as all the Kuagutl agency indians are as one man & all there interest is one.
>
> We beg to ask that you suggest to the Commission for us that they allow all the band chiefs of these different tribes be allowed to meet at Alert Bay at the date the Commission is expected there that after inquiry the Commission could to the differnt villages in the agency to see the Reserves.
>
> Also we earnestly pray you to let us have our own interpreters whom we can trust to tell the Commission our desires & who will make both Indians & Commission to understand what will be said.[35]

When reporting on this incident to Mr. Bergeron, Agent Halliday advised:

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[33] Secretary, Royal Commission on Indian Affairs, to W.M. Halliday, Indian Agent, December 19, 1913 (ICC Documents, p. 57a).

[34] W.M. Halliday, Indian Agent, to J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs, January 27, 1914 (ICC Documents, p. 62).

[35] Indians to Superintendent of Indian Affairs, February 20, 1914, reproduced in Halliday, Indian Agent, to J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs, February 23, 1914 (ICC Documents, p. 64).

> I informed the Indians that the object of the Commission was to deal with the land question and that each tribe would have to stand on its own merits in that respect but I did not think there would be any objection on the part of the Commission to a general meeting when we reached Alrt [sic] Bay.[36]

McKenna-McBride Commission and the Kwawkewlth Agency

Agent Halliday was accurate in his prediction that the Commission would not object to a general meeting at Alert Bay. On Monday, June 1, 1914, the Commissioners met with representatives of the "principal Tribes of the Kwawkwelth [sic] Nation" before meeting with each tribe individually.

It quickly became apparent that the tribes were not adequately prepared for their meeting with the Commissioners. The first witness to address the Commission was Chief Owahagaleese, head chief of the Kwawkewlth Nation. In the course of his opening remarks, he stated:

> I want to bring to your notice the plan of my land that I have here in my hand. It was only given to me on Saturday night, and according to this plan my land is too little; and I don't understand why the plan was given to me - Is it a sign of ownership, if it is, the land is too small.[37]

The Chairman of the Commission asked to see the plan and then responded:

> In respect to these plans that have just been handed to us; I might say that in every place that we have so far visited, the Chiefs of all the

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[36] Halliday, Indian Agent, to J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs, February 23, 1914 (ICC Documents, p. 64).

[37] Chief Owahagaleese, Head Chief of the Kwawkewlth Nation, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 85 (ICC Documents, p. 76).

> different Reserves have plans such as you have just handed in showing on them the land that has been reserved for them – For some reason, however, these plans had not been distributed, and when the Commission arrived they discovered that the Chiefs had never received any plans, and they immediately took steps to have them distributed so that the Chiefs could see what lands they had – Apparently they were lying in the office of the Indian Agent who failed to distribute them to you as ought to have been done.[38]

Chief Willie Harris of the Nimkish Tribe likewise blamed Agent Halliday for the chiefs' lack of preparation:

> It seems that all these people do not know that they have an Indian Agent – They don't understand why they have an Indian Agent – They don't know whether it is good or otherwise. . . .
>
> . . .
>
> He [Halliday] is neither bad or good; but I cannot tell you what Mr. Halliday is just now . . . we ought to have an Agent here who will tell the people here what the mind of the Government is and if there is any privileges. The Indians ought to have been fully instructed about these things – The few minutes that we have been listening to you our eyes have been opened, and the Indian Agent ought to have told us about all those things. You ought to have seen us in the general meeting this morning before you came – We had the plans, and one would say [Referring to the Indian Reserves on the plans] "where is it" "whose is it" and we cannot tell you. We want to show you how helpless we are, and we think the Indian Agent should have told us about all these things.[39]

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[38] Chairman, Royal Commission, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 86 (ICC Documents, p. 77).

[39] Willie Harris, Chief of the Nimkish Tribe, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, pp. 88-89 (ICC Documents, pp. 79-80).

In response to the criticisms of Agent Halliday, the Chairman outlined the duties of the Indian Agent:

> The Indian Agent's [sic] are appointed and paid by the Dominion Government. Their duty is to stand by and protect the Indians in all their rights - to visit the Reserves from time to time and see that no one is interfered with them in their privileges; To be their friend and to give them good advice; To tell them what it is best for them to do and to look after them as a father would his children. It is also his duty to prevent them from disobeying the laws; To prevent them if possible from doing what is wrong; To explain the law to them and see that it is enforced and to keep them informed as to the mind of the Government. As to these charts, we may tell you, that the Indian Chiefs wherever we have been value these very much indeed, because it shows them what land have been reserved to them, and it is the duty of you Indians that if anyone trespasses on your Reserves you should go and complaine [sic] to the Indian Agent and tell him so that he may be able to do something for you.[40]

Johnnie Scow of the Kwicksitaneau Band shared Chief Harris's view that the tribes had received the plans of the area too late to be properly prepared for the hearings:

> Another thing we want to tell you about is that you have seen how confused we are over those papers - We cannot help it because we don't know much. It was given to us only a short time ago, and we cannot make head nor tail of it. They can't get to learn those plans in three days - they don't know what they are, why they are or where they are.[41]

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[40] Chairman, Royal Commission, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 89 (ICC Documents, p. 80).

[41] Johnnie Scow, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 92 (ICC Documents, p. 83).

The Chairman answered that the commissioners would probably be able to explain the plans better when they met with each tribe. Johnnie Scow pointed out that he had often asked for a plan of his land, but he had been unable to obtain one. To the Chairman's question, "Who did you ask?" Mr. Scow replied:

> Mr. Halliday the Indian Agent. The only answer that I have ever got is "I know what you say and I know all about it." He told me that "there was no need of my knowing it" - That I will bring up when my Tribe is being examined. Of course there is no reserve or plan for my Tribe - There is no plan there on the Commissioners table of my Tribe and all the other tribes have one.[42]

Despite their lack of preparation, several representatives of the Kwawkewlth Nation took the opportunity to express their concerns on a variety of issues, with particular attention being given to the loss of their traditional lands and fishing rights. On behalf of the Nimkish Band, Chief Lageuse stated:

> If you should feel that I have asked for too much, I want you to understand that I have not. I ask for the exclusive right for all the people what I have to keep me in food, and that is where I get all that I have, and I want to have these rivers, and I want to have the exclusive right that I may be able to sell the fish after I have used what I want myself.[43]

The first day's session concluded with a lengthy discussion of the potlatch ban and its application to the Kwawkewlth tribes. The potlatch law amply demonstrates the level of control exercised by the Indian Agent over the lives of the Pacific coast tribes that practised this ceremony. It is apparent from the testimony of the 'Namgis people during both the McKenna-McBride Commission's hearings and this Commission's hearings that the potlatch ban evoked considerable tension between the Nimpkish and Agent Halliday. In light of the strong feelings that persist even to this day among members of the First Nation, we provide a brief description of the potlatch and Agent Halliday's strict enforcement of the prohibition in Appendix B to this report.

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[42] Johnnie Scow, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 92 (ICC Documents, p. 83).

[43] Chief Lageuse, Nimkish Band, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 87 (ICC Documents, p. 78).

McKenna-McBride Commission and the Nimpkish Band

On Tuesday, June 2, 1914, the second day of the hearings at Alert Bay, the Commission met specifically with the Nimpkish Band. Presentations to the Commission were made by Chief Alf Lageuse and other members of the Band, including Moses Alfred and Ned Harris. The Chief began his remarks by stressing that the land belonged to him and his people. He stated that "it would not be right for the Provincial Government not to treat me right in my own country where I was born and my forefathers were born."[44] He went on to review the history of settlement in the Nimpkish territory:

> I know that the whiteman only borrowed the little pieces that they made their homes and their business places on. It belonged to the Tribes that lived on this Island. I and my people did not know that these whitemen were not true to us that they were claiming the land because the Island belonged to the whole of us; the majority of the Kwawkewlth Agency. . . . When the first whitemen came here they

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[44] Chief Alf Lageuse, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 137 (ICC Documents, p. 87).

> saw where our village sites were; they were all cleared, and he came along and built his house on these cleared pieces and claimed the land. At the present time, under the circumstances, the people cannot make their living on this land because it is not big enough for the use of my people and myself.[45]

Chief Lageuse pointed out that the land applications he wished to put forward represented less than one-quarter of the total number of village sites that originally belonged to his ancestors:

> I have a few villages that belonged to my forefathers not one-quarter that is on this list, but I have put some places that I would like to be reserved for my Tribe to be picked from. They belong to us, but in order to make it short for you, I have just put on this list the villages that we want reserved for us . . . and that is why I want you to tell me straight and I will be straight with you – I want to know how many months or years before you can let us know when you can let me have all these lands, and that is why I particularly ask that the Government that is selling the land around here will reserve that list that I have given you until it is settled what land I am to own.[46]

In answer to Chief Lageuse's question, the Chairman of the Commission explained that they were travelling all over the province and that when they finished their examination of the situation they would write a report that would go before the two governments. With respect to the lands that Chief Lageuse wanted reserved, the Chairman stated that the Commission would send a list of those lands to the provincial government and that, if they had not been sold, they would be held by the provincial government until the whole matter was decided. The Chairman's remarks prompted the following exchange:

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[45] Chief Alf Lageuse, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 138 (ICC Documents, p. 88).

[46] Chief Alf Lageuse, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 138 (ICC Documents, p. 88).

> THE CHIEF: I ask that the land be reserved until the time the Government is prepared.
> THE CHAIRMAN: Only the pieces that are open will be granted; but the pieces that are already disposed of, of course we cannot do anything with that.
> THE CHIEF: I am told that it is all taken up, and I want to ask the Royal Commission where am I going to get the land . . .
> THE CHAIRMAN: No, it is not all taken up. Some of these lands are not only sold, but they have timber limits for a certain number of years, and after the timber is cut off, then it might be possible they can get a piece of these lands.
> THE CHIEF: The land would not be useless, but it is for the timber that we want the land for the young people to work at.
> THE CHAIRMAN: We are willing and anxious to do the best we can, but our powers are limited. Where the land has been sold we cannot do anything with it.
> THE CHIEF: This is very serious to me, that it has never in my mind gone out of my hand - I never gave it to the Government; I expected and claimed it as my own all along. I want every man to get 200 acres and a title to the same.[47]

When Chief Lageuse finished his opening remarks, he was asked to provide sworn testimony regarding the social and economic conditions of the Nimpkish people. Moses Alfred and Ned Harris were then placed under oath and questioned about the use that was made of the existing Nimpkish reserves.

In the next stage of the proceedings, Chief Lageuse was examined on the seven land applications he had submitted to the Commission. These applications

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[47] Chief Alf Lageuse, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 139 (ICC Documents, p. 89).

(referred to as "Additional Lands Applications") were later numbered 72 through 78 and, to avoid confusion, these numbers will be used throughout this report. Chief Lageuse's description of, and comments on, the lands applied for were as follows:

Application 72 (Extension of IR No. 3 past No. 4 to No. 5, to where the river broadens into the lake [Woksamak])

> MR. COMMISSIONER MCKENNA: . . .
> They want this Reserve (No. 3) extended past No. 4 and beyond No. 5 to where the river broadens out into the lake. . . .
>
> A. [Chief Lageuse] We want it for the timber and the land, as well as the right to fish.
>
> Q. That land appears to be all taken up; either crown-granted or covered with timber licences – there appears to be on this old map some pieces vacant. The best the Commission can do is to carefully enquire if there is any land available there, and then do the best they can under the circumstances.
>
> A. If it is timber limits after they have cut the timber off, we are prepared to take the land then.[48]

Application 73 (1/2 mile on each side of Nimpkish river from Kla-anck to Wilkiamayi)

> Q. [Commissioner McKenna] No. 2 application, is there an Indian house there?
>
> A. [Chief Lageuse] Yes.
>
> Q. An old one?
>
> A. Yes.
>
> Q. How long is it since anyone lived there?
>
> A. It takes two days poling up the river that empties into the lake.
>
> MR. COMMISSIONER MCKENNA: It takes eight or nine days poling

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[48] Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, pp. 153-54 (ICC Documents, pp. 103-04).

up the river, and this place takes about two days poling up the river.

Q. How much land do you want there?

A. 100 acres.

Q. What do you want it for?

A. For the land, the timber and the hunting.

Q. Do you intend to farm there, is it wanted for farming purposes?

A. It is for farming and gardening.

Q. You said there was an old village there?

A. Yes, there are signs of it there yet.

Q. Is it an old village of this Tribe?

A. Yes.

Q. Was it cleared?

A. Yes, by the Indians, and there is grass there – that is a valued site.

Q. Is it a long time since any Indians occupied that place?

A. Yes, it is quite a while – before I was born. It is about 50 years since we had a permanent village there.

Q. Have they used it in the meantime for any purpose?

A. No.

Q. As to this, we cannot identify what property has been disposed of, but we will investigate the matter and consider the application.[49]

Application 74 (Duhdahyilesdamis)

Q. [Commissioner McKenna] Now we come to application No. 3, at Port McNeill – you ask for half a mile there on each side of the river or creek – That land is all crown granted.

A. [Chief Lageuse] There was an Indian clearing there. Mr. Hall the missionary took this place and sold it to Chambers. . . .[50]

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[49] Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 154 (ICC Documents, pp. 104).

[50] Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, pp. 154-55 (ICC Documents, pp. 104-05).

Application 75 (Strip of land 1/2 mile in from Beaver Cove to a small lake [Wadsu] midway and on the east side of Nimpkish Lake)

Q. [Commissioner McKenna] Now we come to application No. 4 for a strip of land half a mile from Beaver Cove to a small lake about midway on the east side of Nimpkish lake for a trapping and hunting ground. . . . Do you get deer there?

A. [Chief Lageuse] Yes, but the game is pretty scarce there now.

Q. Do the Indians go there to trap now?

A. Yes, two or three of them. . . .

Q. There appears to be some land vacant in that vicinity, and the matter will be carefully gone into.[51]

Application 76 (Ksuiladas or Plumper Islands)

A. [Chief Lageuse] They want the three large Islands in the Plumper Island group. They are the only ones large enough to put erections on.

Q. [Commissioner McKenna] What do you want those Islands for?

A. For halibut fishing station, so that we can catch them and cure them there. . . .

MR COMMISSIONER MCKENNA: It would appear that these Islands are "open" as far as we can see now, and the matter will receive careful consideration.[52]

Application 77 (Kuldekduma or Pearse Islands)

Q. [Commissioner McKenna] Now we come to Application No. 6, to what is known as Pearce Islands. . . How much do they want there?

A. [Chief Lageuse] They want all of the Pearse Islands.

Q. What do you want those Islands for?

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[51] Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 155 (ICC Documents, p. 105).

[52] Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 155 (ICC Documents, pp. 105).

A. We want them for a halibut fishing station, also for the fir trees that are there.[53]

Application 78 (Enlargement of Alert Bay IR)

Q. [Commissioner McKenna] Application No. 8 that is for an extension of the Alert Bay Indian Reserve. About half the width of the Reserve runs the depth of Section 4 Rupert District, and the other half only runs about one-third of what you ask. You want the south and east lines to be extended until they intersect . . .

A. [Chief Lageuse] Yes.

Q. And that would be about 20 acres - and that would take in the slough and the source of the creek from which they want to secure their domestic water supply.

INDIAN AGENT HALLIDAY: That all belongs to the Cannery.

MR. COMMISSIONER MCKENNA: That appears to be alienated and to be now owned by the cannery. . . .[54]

The Chief concluded this part of his testimony by thanking the commissioners for their patience and hard work "in trying to settle up the affairs of my Band."[55]

Following their meeting with the tribes of the Kwawkewlth Agency, the commissioners returned to Victoria, where they met with Indian Agent Halliday on June 24, 1914. Although the official transcript of this interview is not available, we do have a précis report from the records of the Royal Commission describing the interview with Agent Halliday and noting his recommendations with respect to the land applications from his Agency. According to the précis report, Agent Halliday began by explaining that he had been the Agent for the Kwawkewlth Agency for eight years and that he "had a fair knowledge of all the reserves in the Agency."[56] After commenting on the general state of affairs in the Kwawkewlth Agency, Agent Halliday reviewed the Additional Lands Applications put forward by the various tribes in his Agency. With regard to the applications by the Nimpkish Band, Agent Halliday made the following observations and recommendations:

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[53] Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, pp. 155-56 (ICC Documents, pp. 105-06).

[54] Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 156 (ICC Documents, p. 106).

[55] Chief Alf Lageuse, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 158 (ICC Documents, p. 108).

> **Application 72** (extension of IR 3): This application "was apparently all covered [by a timber limit]. If possible, however, he would recommend that this land be given to the Indians after the timber thereon had been removed. . . . His recommendation was for the granting of about 500 acres."[57]
>
> **Application 73** (1/2 mile on each side of Nimpkish river from Kla-anck to Wilkiamayi): "As for Kla-anck, applied for by Chief Willie Harris on the ground that his forefathers had had a village there, he would not recommend this application as the land was so isolated that it would never be used."[58]
>
> **Application 74** (Duhdahyilesdamis): He would not recommend the application for Duhdahyilesdamis, "the land affected being found to be alienated."[59]

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[56] Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 129).

[57] Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 130).

[58] Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

[59] Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

> **Application 75** (strip of land 1/2 mile in from Beaver Cove to a small lake [Wadsu] midway and on the east side of Nimpkish Lake): "The application for land from Beaver Cove to Wadsu Lake was not recommended, as unnecessary; the Indians might hunt and trap in that locality without interference, and if granted them, they would make no other use of this land."[60]
>
> **Application 76** (Ksuiladas or Plumper Islands): He recommended "that the application for Plumper Islands be granted, with a maximum allowance of 100 acres."[61]
>
> **Application 77** (Kuldekduma or Pearse Islands): "The Pierce [sic] Islands had long been used by the Indians as a fishing station, and he recommended that the smaller Islands of the group, lying on the eastern side and containing fifty or sixty acres be granted; these Islands were small and rocky and used only as basis [sic] for fishing operations."[62]
>
> **Application 78** (enlargement of Alert Bay IR): "He did not recommend the application for an extension of Reserve No. 1, the lands affected being found to be already alienated."[63]

The précis report also contained the following general note concerning the status of the reserve lands available to the Nimpkish:

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[60] Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

[61] Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

[62] Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

[63] Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

> At present more land was not required by this Band, but it was one of the few in the Agency increasing numerically, and also one of the most progressive, and required room for expansion.[64]

Despite this comment, Agent Halliday still supported only three of the Nimpkish applications (72, 76, 77) with modifications, and recommended that the other four be rejected. Application 72 was requested for the timber and fishing, and Applications 76 and 77 were intended to be used as fishing stations. Applications 73 and 78 were requested for settlement purposes to allow for future expansion of the Band, but were not recommended by Halliday because the former was too remote and the latter was already alienated.

The Commissioners had not forgotten that the tribes of the Kwawkewlth Nation had been considerably disenchanted with Agent Halliday during the Commission's visit to the Kwawkewlth Agency, and they asked Agent Halliday if he wished to make any statement in relation to the complaints they had heard about him. Agent Halliday explained that the Commission had come into his Agency just after he had completed a number of prosecutions under the anti-potlatch law. He felt sure that, "[i]f it had not been for his action against the potlatch . . . no complaints against him would have been expressed."[65]

In July 1914 W.E. Ditchburn, Inspector of Indian Agencies for British Columbia, submitted his report for the months of May and June to the Department of Indian Affairs. In his report he included a description of his tour of the West

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[64] Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 130).

[65] Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Exhibit 6).

Coast and Kwawkewlth Agencies with the McKenna-McBride Commission. Inspector Ditchburn noted that while the Indians on the West Coast were very moderate in their requests for additional reserve lands, the Indians of the Kwawkewlth Agency had "asked for very extensive tracts of land, each tribe asking for from five to twenty new large allotments."[66] He observed that, since most of the land in the Agency had already been alienated by the Crown, it was doubtful whether the Commission would be able to fulfil the wants of the Indians.[67]

McKenna-McBride Commission's Recommendations for Additional Lands

In October 1914 the Commission dispatched Ashdown Green, variously described as technical officer and surveyor to the Commission, to Alert Bay. Mr. Green forwarded his report to the Commission in December 1914, at which time he commented on his activities on the coast of Vancouver Island:

> [O]n 3rd October I arrived at Alert Bay. The Agent, Mr. Halliday, was away for a few days and did not return until the 6th, in the meantime I had the engine of the launch repaired and took on oil, fuel and stores.[68]

Green visited both the Plumper and Pearse Island groups on October 15, 1914, and, in his report, he gave the following details about them:

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[66] W.E. Ditchburn, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, July 1914 (ICC Documents, p. 135).

[67] W.E. Ditchburn, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, July 1914 (ICC Documents, p. 135).

[68] Ashdown H. Green, BCLS, to Secretary, Royal Commission on Indian Affairs, December 21, 1914 (ICC Documents, p. 136).

> Ksui la das, the most southwesterly island of the Plumper group contains about 70 acres. It is a well sheltered spot with a good gravel beach. Some five or six acres might be made into gardens, the remainder of the island is rocky. The Indians say they carry the timber to Alert Bay for firewood, but its principal use is as a fishing station.
>
> Kul de kdusna, situated about 4 miles east of Alert Bay, is the most northeasterly island of the Pearse group. It contains about 60 acres, the whole of which is rock. With the exception of a small cove on the southern shore the waterfront is steep, and on the northern portion precipitous. The timber is small and principally hemlock, though there is a limited quantity of fir which the Indians use for fuel. One dilapidated house is the only sign of Indian occupation; it is used when halibut or cohoe fishing.[69]

By the summer of 1915, the Commission had obtained further information regarding the availability of land in the Kwawkewlth Agency. When it became apparent that much of the land requested by the Kwawkewlth tribes was unavailable, the Secretary to the Royal Commission wrote to Agent Halliday to apprise him of the situation. In a letter, dated July 28, 1915, the Secretary explained that out of a total of 195 applications submitted from the Kwawkewlth Agency, Agent Halliday had endorsed 73, rationalizing the rejection of the others on the grounds that he "thought the requirements of the Indians would be sufficiently met by the granting of the lands applied for which [he] did recommend."[70] However, of these 73 recommendations, the lands had been reported alienated and unavailable in 46 cases.[71] The Secretary went on to ask whether Agent Halliday, in light of the unavailability of these lands, wished to reconsider some of the applications he had originally rejected. The Secretary gave the following specific directions:

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[69] Ashdown H. Green, BCLS, to Secretary, Royal Commission on Indian Affairs for the Province of B.C., December 21, 1914 (ICC Documents, p. 137).

[70] Secretary, Royal Commission on Indian Affairs for the Province of B.C., to W.M. Halliday, Indian Agent, July 28, 1915 (ICC Documents, p. 144).

[71] Secretary, Royal Commission on Indian Affairs for the Province of B.C., to W.M. Halliday, Indian Agent, July 28, 1915 (ICC Documents, p. 144).

> [T]he Commission would be glad to know if you desire to reconsider your opinion with regard to any of the applications which were not endorsed, in order that alternative lands may possibly be obtained under such applications to meet the requirements of the Indians which would otherwise not be met.
>
> I have therefore to request that you go over such applications carefully and report in detail your views thereon to the Commission, accurately describing such alternative lands as you may see fit to recommend, assuring yourself that such lands are vacant and available . . .[72]

In response to the Commission's request for a revised set of recommendations, Agent Halliday replied:

> Application 76 [sic] Kuldekduma or Pierce [sic] Islands.
>
> When Mr. Green visited these islands it was thought sufficient to give the most north easterly island of the Pearce [sic] group but as application 71 [sic] has been rejected I would strongly recommend that they be given all the Pearce [sic] group excepting the large one lying to the south west of the group.[73]

On September 1, 1915, the Secretary to the Commission informed Agent Halliday that his report on the additional lands applications of the Kwawkewlth Agency met the requirements of the Commission and, therefore, it would be unnecessary for him to be re-examined.[74]

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[72] Secretary, Royal Commission on Indian Affairs for the Province of B.C., to W.M. Halliday, Indian Agent, July 28, 1915 (ICC Documents, pp.144-45).

[73] W.M. Halliday, Indian Agent, to C. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of B.C., August 11, 1915 (ICC Documents, p.149). It should be noted that Agent Halliday's reference to Application 71 is a mistake; it should be Application 72. Similarly, the Pearse Islands application should be 77 and not 76 as indicated here.

Early in 1916 R.A. Renwick, Deputy Minister of Lands for British Columbia, advised the Secretary to the Commission that the lands recommended by the Commission for Applications 76 and 77 (the applications relating to the Plumper and Pearse Islands) were "apparently vacant and available for Indian purposes subject to survey."[75] A short time later, the commissioners met to review the evidence before them and compile their final report. In a meeting on February 25, 1916, they approved, in part, the Nimpkish applications for additional lands numbered 76 and 77.[76]

The Commission issued its final report on Indian Affairs in British Columbia on June 30, 1916. Included in the report were Minutes of Decision, dated August 14, 1914, which confirmed the five reserves allotted to the Nimpkish by Reserve Commissioner O'Reilly in the 1880s.[77] Also included in the report was a table

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[74] Secretary, Royal Commission on Indian Affairs for the Province of B.C., to W.M. Halliday, Indian Agent, September 1, 1915 (ICC Documents, p.151).

[75] R.A. Renwick, Deputy Minister of Lands, British Columbia, to C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of B.C., February 21, 1916 (ICC Documents, p. 152).

[76] Minutes of Meeting, Royal Commission on Indian Affairs for the Province of B.C., February 25, 1916 (ICC Documents, p.157).

[77] Minutes of Decision, Royal Commission on Indian Affairs for the Province of B.C., August 14, 1914 (ICC Documents, p. 163). The Minutes provide:

> ORDERED: That the Indian Reserves of the Nimkeesh Tribe, numbered from 1 to 5, both inclusive, described in the Official Schedule of Indian Reserves, 1913, BE CONFIRMED as now fixed and determined and shewn on the Official Plans of Survey, viz.:
>
> "No. 1 - Alert Bay, 46.25 acres;

summarizing the Commission's decisions with respect to the seven applications for additional lands submitted by the Nimpkish Band. In regard to Applications 73, 76, and 77, which are at issue in this inquiry, the report states:

Application 73:
LAND APPLIED FOR: "1/2 mile on each side of Nimpkish river from Klaanck to Wilkiamayi . . ."
STATUS OF LAND DESIRED: –
DECISION OF COMMISSION: "Not entertained, as not reasonably required."

Application 76:
LAND APPLIED FOR: "Ksuiladas or Plumper Islands – three large islands of the Plumber [sic] Group."
STATUS OF LAND DESIRED: "Reported by Lands Committee as open and available."
DECISION OF COMMISSION: "Allowed: Ksui-la-das, the southwesterly island of the Plumper group . . . approximately seventy (70) acres, subject to survey and to any rights under the 'Mineral Act' which may have been acquired prior to constitution as a Reserve."

Application 77:
LAND APPLIED FOR: "Kuldekduma or Pearse Islands."
STATUS OF LAND DESIRED: "Reported by Lands Committee as partially open and available."
DECISION OF COMMISSION: "Allowed: Kuldekduma Island, the most northerly of the Kuldekduma or Pearse group . . . approximately sixty (60) acres, subject to survey and to any rights under the 'Mineral Act' which

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No. 2 - Burial Ground, 1.87 acres;
No. 3 - Ches-la-kee, 302.87 acres;
No. 4 - Ar-ce-wy-ee, 41.30 acres, and
No. 5 - O-tsaw-las, 53.25 acres."

> may have been acquired prior to constitution as a Reserve."[78]

Based on this information, the Commission ordered that only two new reserves be created for the "Nimkeesh Tribe":

> [Application 76] ORDERED: That there be allowed under this Application and established and constituted a Reserve for the use and benefit of the applicant Nimkeesh Tribe, Ksui-la-das Island, the south-westerly island of the Plumper Group, as per sketch plan of Ashdown H. Green, B.C.L.S., . . . containing an area of Seventy (70) acres, more or less . . .
>
> [Application 77] ORDERED: That there be allowed under this Application and established and constituted a Reserve for the use and benefit of the applicant Nimkeesh Tribe, Kuldekduma Island, the most northerly of the Kuldekduma or Pearse Group, as per sketch plan of Ashdown H. Green, B.C.L.S., . . . containing an area of Sixty (60) acres, more or less . . .[79]

It is useful to note that action on the Additional Lands Applications of the Kwawkewlth Agency resulted in the creation of 29 new reserves, comprising an area of 1902.29 acres, which made the net total of the Agency increase 1761.43 acres. The Agency now had 118 reserves of an aggregate area of 18,228.06 acres, or 15.43 acres per capita.[80] In contrast to the Agency average, the Nimpkish had received an additional 130 acres, raising their total reserve acreage to approximately 575 acres, or an average of 4.2 acres per Band member.[81]

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[78] Kwawkewlth Agency - Additional Lands Applications (ICC Documents, p. 1).

[79] ICC Documents, p. 163a.

[80] Final Report, Royal Commission on Indian Affairs for the Province of British Columbia, June 30, 1916 (ICC Documents, p. 160).

The Commission's recommendations, of course, were not binding on either the federal or the provincial governments. According to the terms of the Orders in Council approving the McKenna-McBride Agreement, both governments had to endorse the Commission's report before action could be taken on its proposals. It was not until 1919 that the province passed legislation enabling it to give effect to the Commission's report and to carry on further negotiations.[82] The federal government passed reciprocal legislation a year later.[83]

In 1920 British Columbia proposed that a joint review of the complete report be carried out. This inquiry was conducted by W.E. Ditchburn, representing Canada, and J.W. Clark, who acted on behalf of the province. They finished their inquiry by March 19, 1923. With regard to the reserves created for the Nimpkish, they upheld the proposals contained in the original report of the McKenna-McBride Commission.

The recommendations of the McKenna-McBride Commission as amended by Messrs Ditchburn and Clark were formally accepted by provincial Order in Council 911 on July 26, 1923. Canada followed suit with federal Order in Council 1265 on July 19, 1924. The reserves were finally transferred to the administration and control of Canada under the authority of provincial Order in Council 1036 on July 29, 1938.[84]

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[81] When the McKenna-McBride Commission examined Agent Halliday on June 24, 1914, he reported that the population of the Nimpkish Band was 137: see Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 130).

[82] *Indian Affairs Settlement Act*, SBC 1919, c. 32.

[83] *The British Columbia Indian Lands Settlement Act*, SC 1920, c. 51.

ORAL HISTORY

During the community session at Alert Bay, several elders and community members provided evidence that the lands at issue in this inquiry were, and continue to be, very important to the 'Namgis people. They also shared with us some of their feelings about Agent Halliday and the devastating impact his actions had on their community.

Application 73: Woss

Included in Application 73 was the area around Woss. Bill Cranmer[85] described at some length the use that was made of this area:

> Woss Lake is the major spawning lake for the sockeye salmon. At one time the Nimpkish River was the third largest sockeye producer on the B.C. coast, and the sockeye would come in for the Woss around June. They'd travel up the Nimpkish system. And at one time our people used to go up there to dry the salmon after they'd spawned. And they did that for a reason that when they reached that area they'd used up most of the oil and the fat from their body and it would preserve better for drying and to provide the food for the winter.

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[84] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 148-49, 160.

[85] At the time of the community session, Bill Cranmer was the director of the U'mista Cultural Centre. He is currently the chairman of the board of the Centre and was elected Chief of the 'Namgis First Nation on May 10, 1995.

And my mother said that my father had a smokehouse there right up to the time the logging companies were starting to get established there, and his smokehouse was demolished by the logging companies.

So our people used that area for the gathering of the sockeye salmon. And there was another distinct sockeye salmon run that went up to Vernon Lake, which is a lake even further up the valley. And the whole of the Nimpkish River system was used for food gathering. It's a well known fact that the Nimpkish were a very wealthy tribe at one time because of the resources of the river.

As a matter of fact, one of our creation stories for the Nimpkish is that in the early days when the Creator came around, they asked one of the early Nimpkish what he wanted to be, if he wanted to be something else. And they asked him if he wanted to be a mountain, and he said no. "Do you want to be a tree?" He said no, that he wanted to be a river so he could flow forever and provide our people with fish. And the name of the river is Gwa̲ni. So even far back as that our people recognized the importance of the river, Gwa̲ni River, to supply the resources that kept our people alive and in those early days kept them a very wealthy people, that allowed them to carry on their traditions, the potlatch traditions.

MS. GROS-LOUIS AHENAKEW: Do you know if Woss was used for other purposes than fishing activities?

BILL CRANMER: Woss was the point where they would travel to the west coast for trading with the west coast people. I was told also that a lot of our people could speak the language of the west coast. I was listening to a tape recording that my father made that said his dad could speak the west coast language because of the amount of trade that was done through the Grease Trail, as they called it.

MS. GROS-LOUIS AHENAKEW: Could you explain to us why it was called the Grease Trail?

BILL CRANMER: Well, on the coast of British Columbia there's very few places where they made the oolichan grease. It is quite a treasured commodity. It was used by our people as flavouring for the food that we ate. It was believed to have medicinal purposes. I can remember when I was little and I used to get sick, my mother used to spoon feed the klina, which is what we call it, into me to make me better.

> But in the early days – even now there are only two rivers in this whole area that the oolichans go to spawn. That's in the Kingcome Inlet and the Knight Inlet. And in the Knight Inlet area all of our tribes had traditional spots where they could fish for oolichans and prepare oolichans on what they call the Klina-Klina River now. And they would come back to their villages and that would be a major trade item because of the scarcity of other rivers that provided oolichans.[86]
>
> – Bill Cranmer

George Cook provided similar evidence:

> it [Woss] was a home for our people and they dried sockeye up at Woss. And also that the west coast and we – there's a trail that was used and it's called the Grease Trail that comes through Woss and comes into the Nimpkish, and it was used for trading – trading, and it was very important at Woss. There's a piece of land up there which was used for trading, and this is why that Woss was important to our people.
>
> The Grease Trail, I think to my knowledge that there's still some type of remains at Woss when they – they didn't abandon it. So you can see the importance of Woss and also that I think I recall that it only just didn't stop at Woss, that there was another village further up in there called Vernon Lake. There was another village there also. So Woss was very important to us also.[87]
>
> – George Cook

We also heard evidence that, at one time, people stayed at Woss:

> MS. GROS-LOUIS AHENAKEW: Did people stay there [at Woss]?
>
> ETHEL ALFRED: Yeah. My husband used to tell me that they used to stay there, eh, but I never went up there to Woss. He always did

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[86] ICC Transcript, April 21, 1995, pp. 18-21 (Bill Cranmer).

[87] ICC Transcript, April 21, 1995, pp. 7-8 (George Cook).

> talk about it when you going towards the island, we always mentioned, you know, that the white people has taken away that from us. He said that they claim that we don't own it. It's called Wa'as in Indian, Wa'as, and that's why the white people call it Woss . . .
>
> MS. GROS-LOUIS AHENAKEW: Was there any sign of permanent living there? Was there houses? Was there something to shelter the people on these islands?
>
> ETHEL ALFRED: Yeah, he said there were houses there. He used to say that there used to be houses there. . . .[88]

– Ethel Alfred

Despite the fact that the Woss area played an important role in the history and culture of the 'Namgis people, Agent Halliday did not support the Band's application for that land because he considered this area to be too remote from Alert Bay. During this Commission's inquiry, Mr. Bill Cranmer suggested that Mr. Halliday was motivated primarily by a desire to prevent the 'Namgis people from practising the potlatch:

> The name of Mr. Halliday has been brought up, and one can only assume that his master plan was to try to keep the Namgis here in Alert Bay, especially when he recommended that this be one of the lands that be increased to accommodate the Namgis, and the minimal recommendations that he made for the outlying islands would prevent the Namgis from travelling too far from Cormorant Island. I would see the same thing in the Nimpkish River system, where his comment was that it would be too far for the Namgis to travel to gather their traditional resources.
>
> . . .
>
> And again, you'd wonder what the master plan of Indian Agent Halliday, when he was instrumental in changing the *Indian Act* in the early 1900s to the point in 1921 when they arrested all the people that

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[88] ICC Transcript, April 20, 1995, pp. 24-25 (Ethel Alfred).

> attended my father's potlatch in Village Island, where he could act as the judge at the trials of our people, where it was already demonstrated that he was working for the years before that in trying to stamp out the potlatch. There were many people arrested prior to that in 1921, but the judges at the time who tried these cases would dismiss the cases because the Act was not clear. But Mr. Halliday was instrumental in changing the *Indian Act* so that he alone could be the judge and thereby arresting and sending our old people to prison.
>
> So we can just imagine what his master plan was for the Namgis and the other Kwakwala-speaking peoples, is to keep them in one small confined area. . . .[89]
>
> – Bill Cranmer

Applications 76 and 77: Plumper and Pearse Islands

The lands covered by Applications 76 and 77 were in the Plumper and Pearse Island groups, respectively. Ethel Alfred and Peggy Svanvik described the food-gathering activities that took place there:

> My father used to fish a lot, jig, and he used to bring a lot of cod home that my mother used to smoke and dry sometimes and we would just eat it or salt it. And it was all around the little islands, the surrounding islands, like I suppose Plumper and Pearse, and we used to go to Haddington Island as well for all of the things that the people have mentioned – clams and fish, and like here on this island, seaweed.[90]
>
> – Peggy Svanvik

> MS. GROS-LOUIS AHENAKEW: . . . I'd like a little more information about Plumper Island and what kind of activity took place around that island, if you remember.
>
> ETHEL ALFRED: Well, they used to go fishing for halibut, to dry halibut there, and dry clams, and that's when they used to go there,

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[89] ICC Transcript, April 21, 1995, pp. 14, 16-17 (Bill Cranmer).

[90] ICC Transcript, April 20, 1995, p. 33 (Peggy Svanvik).

> when halibut season is on when they come around. So that's what the people, they used to have houses there. . . .[91]
>
> – Ethel Alfred

> MS. GROS-LOUIS AHENAKEW: . . . You mentioned that the people used to fish, and they still do, but did they also hunt?
>
> ETHEL ALFRED: Oh, yes.
>
> PEGGY SVANVIK: Yes.
>
> MS. GROS-LOUIS AHENAKEW: Where did the hunting take place?
>
> PEGGY SVANVIK: All over. I remember like Cracroft Island and different places like Pearse and all. My father used to do a lot of hunting, and he hunted all over.[92]
>
> – Ethel Alfred and Peggy Svanvik

Mary Hanuse told us that the Pearse Islands were used for shelter: "I know that was a place where people, if you're caught in the storm you go inside the Pearse Island. There were some houses there."[93]

George Cook echoed much of the evidence given by the other witnesses and provided further details:

> And on our claim, which is the Pearse Island group, that that was also used as a safe haven because the waters surrounding the Pearse Island group was – this is where even today that we still fish for cod, halibut. And also on the Pearse Island that we pick seaweed even today. That goes back in history. And also we picked sea eggs there, which we used also, and Chinese slippers they're called. These were all on Pearse Island. And also on Pearse Island, there's deer on that island and it was passed down to me that – whenever there was a storm or

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[91] ICC Transcript, April 20, 1995, p. 38 (Ethel Alfred).

[92] ICC Transcript, April 20, 1995, pp. 39-40 (Ethel Alfred and Peggy Svanvik).

[93] ICC Transcript, April 20, 1995, p. 8 (Mary Hanuse).

> anything that they had to stay there to wait out the storm or things like that, that there was always meat and a food supply from Pearse Island. Pearse Island was very important.
>
> And also the passes and the other islands also, that because the abundance of halibut in the area, especially at this time of the year, that they used that place to dry halibut, and it was kind of – it was used like a station, I think it's called, or it was just a home. So all of the islands that are concerned here is very important, and it was well used even way back as time began.
>
> . . .
>
> . . . since our food supply was here in the surrounding waters adjacent to Pearse Island and the Plumper Islands . . . we needed to have these islands as our safe havens and for purposes of drying. And you have to realize that our people, when they went to these islands and stayed here instead of – them days we only had canoes, what I was told, canoes, and so they just stayed on these islands and did drying, what we call kawashtay (phonetic) is dried halibut that – they can dry it and they can – it lasts us just the same as on the Prairies you have jerky. And so that's what they did here, and the food supply can last all winter once this was all dried.[94]
>
> – George Cook

Indian Agent Halliday

Several witnesses spoke of the hardship caused by Indian Agent Halliday:

> I remember him [Agent Halliday]. He wasn't a very nice man. Yeah, he wasn't very good to us, I don't think. . . .
>
> . . . He used – well, he used to – I don't think he treated our people very nice, Mr. Halliday. I knew his secretary very well. We used to have meetings together because we had a group that we used to call "Young Mothers," and I really used to enjoy going with his secretary.

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[94] ICC Transcript, April 21, 1995, pp. 4-7 (George Cook).

So he didn't treat our people right, I know that for a fact. And I was fortunate enough, you know. I never went to the Indian Agent for – I never went on welfare, so that I was fortunate . . .

So I can't say anything too nice about – I don't want to talk about Mr. Halliday because he wasn't nice to us. And I was about 11 when our potlatch system was taken away from – 1921. It was my auntie and my uncle that had the potlatch, and our people were put in jail for that. My inlaws were part of it because they took part in that potlatch, eh. It's hard to explain how things go, and my dad was a part of it for my aunt. He had quite a bit to do with that. That's why they took all our regalias away.[95]

– Ethel Alfred

MS. GROS-LOUIS AHENAKEW: You mentioned that your parents were sent to jail.
PEGGY SVANVIK: My grandparents.
. . .
MS. GROS-LOUIS AHENAKEW: For a potlatch.
PEGGY SVANVIK: For participating in a potlatch, yeah.
MS. GROS-LOUIS AHENAKEW: Who sent them to jail?
PEGGY SVANVIK: Well, I guess Mr. Halliday.[96]

– Peggy Svanvik

. . . to our people, fighting for land and trying to establish our original claim that we own these territories, these islands, has been a very slow process, and it's also very hard to understand why certain people, especially I guess that you're going to speak of Mr. Halliday, that claims, making decisions after being here for – I think it was eight years – and made a decision on Pearse Island and the Plumper groups. And it's always our intention and it's always in our history that before you make a decision that you have to walk in his moccasins, walk in

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[95] ICC Transcript, April 20, 1995, pp. 29-30 (Ethel Alfred).

[96] ICC Transcript, April 20, 1995, pp. 35-36 (Peggy Svanvik).

> his shoes. Eight years of living in Alert Bay, to have a knowledge of what our ancestors had is unrealistic for Mr. Halliday at that time to make a decision such as he made concerning the Pearse Islands and the Plumper groups and also the Cormorant Island.
>
> . . .
>
> Mr. Halliday was one of the instigators of the stopping of our potlatches, and I think that Mr. Halliday was not acting in the best interests of anyone in this territory, especially Nimpkish. And everything that – according to what was passed down to me is that everything was self-interest, that decisions that were made were not made for the good of the community or any of our villages. I think it was also mentioned yesterday by Mrs. Alfred that he wasn't a very nice man, and when you take that into – coming from an elder and coming from Mrs. Alfred, that these are harsh words, as harsh as can be said in reflection to Mr. Halliday. So you can see the effects that his decision on this village has been quite devastating. And even though that he was here supposedly for the benefit of our Nimpkish people, that was not so. This is what was all passed down to me.[97]

– George Cook

> MS. GROS-LOUIS AHENAKEW: Can she [Agnes Cranmer] remember anything about the claim in question, the use of the land?
>
> AGNES CRANMER: (Remarks in Kwakwala)
>
> BILL CRANMER: She remembers at the time that this is when our people suffered a great deal because of the actions of the white people, I guess especially Halliday, in the banning of the potlatch.
>
> AGNES CRANMER: (Remarks in Kwakwala)
>
> BILL CRANMER: And it wasn't only the chiefs of the Namgis that suffered. It was the chiefs of the other tribes also.
>
> AGNES CRANMER: (Remarks in Kwakwala)
>
> BILL CRANMER: A lot of the lives of our chiefs were ruined because of that action.[98]

– Agnes Cranmer

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[97] ICC Transcript, April 21, 1995, pp. 11-12 (George Cook).

[98] ICC Transcript, April 21, 1995, p. 22 (Agnes Cranmer).

Thus, it is clear from the words of the witnesses that the lands covered by Applications 73, 76 and 77 were of critical importance to the 'Na̲mgis people. It is also evident from the community testimony that Agent Halliday was strongly perceived as acting contrary to the interests and aspirations of the people he had responsibility for as Indian Agent.

PART III

ISSUES

Counsel for the Band framed the issues as follows:

FIDUCIARY DUTY

1 Did Indian Agent Halliday owe a fiduciary duty to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands? If so, did he breach that duty in relation to:

a) Application 73
b) Application 76
c) Application 77

2 Did the McKenna McBride Commission or its agent Ashdown Green owe a fiduciary duty to the Band in relation to their deliberations and investigations with respect to the Band's applications for additional reserve lands? If so, did they breach that duty in relation to:

a) Application 73
b) Application 76
c) Application 77

NEGLIGENCE

3 Did Indian Agent Halliday owe a duty of care to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands?

4 If so, was Indian Agent Halliday negligent in failing to fulfil that duty in relation to:

a) Application 73

b) Application 76
c) Application 77

5 If Indian Agent Halliday was negligent, did his actions or inaction cause the loss of the lands sought by the Band pursuant to:

a) Application 73
b) Application 76
c) Application 77

SPECIFIC CLAIMS POLICY

6 Does this claim fit within the parameters of the Specific Claims Policy?

Counsel for Canada did not formulate their own statement of the issues; rather, they simply summarized and responded to the arguments advanced by the First Nation.

PART IV

ANALYSIS

FIDUCIARY DUTY

Issue 1

Did Indian Agent Halliday owe a fiduciary duty to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands? If so, did he breach that duty in relation to:

a) Application 73
b) Application 76
c) Application 77

Submissions of the Parties

The First Nation submits that Indian Agent Halliday owed the Band a fiduciary duty which consisted "of honesty, good faith, and putting the interests of the Band first and foremost."[99] Moreover, the First Nation asserts that Agent Halliday owed a duty to protect and pursue the best interests of the Indians and bands of the Kwawkewlth Agency, based on "the Federal government's position and policies as set forth in the instructions given to Indian Agents, including Mr. Halliday, the trust-like position of the Indian Agent as set forth in the relevant provisions of the *Indian Act* then in force and in the statements made by members of the McKenna McBride Commission."[100] The First Nation contends that Agent Halliday was obliged not only to protect the existing rights of the Band but also to further its interests in obtaining the additional reserve lands sought by the Band, or, at the very least, those areas that were needed.

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[99] Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 6, 1995, p. 28 (hereinafter referred to as "Namgis Written Submissions").

[100] Namgis Written Submissions, p. 29.

In support of its position, the First Nation maintains that the criteria for a fiduciary relationship identified by Madam Justice Wilson in *Frame v. Smith* and by Mr. Justice La Forest in *Hodgkinson v. Simms* (discussed more fully below) are met in this case. First, Agent Halliday had the scope for the exercise of some discretion or power in relation to all the Band's affairs. He was appointed by the dominion to oversee the affairs of Indians within his Agency, and he had the powers and authority of an *ex officio* magistrate. More specifically, he made recommendations to the McKenna-McBride Commission which were very influential in view of his position as Indian Agent, and he arranged the Commission's and Mr. Ashdown Green's trips to areas within the Kwawkewlth Agency, thus controlling who they met and what they saw.[101] Second, Agent Halliday "was in a unique position in relation to what was put forth to the McKenna McBride Commission. . . . [He] had kept [the Chiefs] in the dark as to what they could seek as new reserves and, rather than forcefully supporting their positions, made them appear disorganized and greedy."[102] Third, the Band was peculiarly vulnerable to Agent Halliday, as is evidenced by the contempt of the Band members towards him, particularly in relation to his involvement with the potlatch trials and the confiscation of valuable artifacts. The First Nation concludes that, "[a]s a result of his powers under the *Indian Act* and given the policies of the Department of

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[101] Namgis Written Submissions, p. 29.

[102] Namgis Written Submissions, p. 29.

Indian Affairs, Indian Agent Halliday could do virtually what he wished in relation to the interests of the Band and its members."[103]

The First Nation goes on to argue that Indian Agent Halliday breached his fiduciary duty in relation to each of the applications at issue in this inquiry. With respect to Application 73, the First Nation submits that the compelling testimony of Chief Lageuse before the McKenna-McBride Commission, and the evidence of the elders before the ICC on April 20 and 21, 1995, demonstrated the importance of the Woss area to the 'Namgis people. This evidence belies the reason given by Agent Halliday for his refusal to recommend this application – namely, that "the land was so isolated . . . it would never be used." The First Nation submits that Agent Halliday either failed to represent the interests of the Band or, if his statement was made out of ignorance, failed in his duty to inform himself as to the true state of affairs before making his recommendation. In this regard, the First Nation argues that "a crucial part of the fiduciary obligation owed by Indian Agent Halliday to the Band was a duty to consult the Band before making representations to the McKenna McBride Commission."[104] By failing to consult with the Band, and by failing to protect its interests to obtain reserve land, the First Nation submits that Agent Halliday breached the fiduciary duty that he owed to the Band:

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[103] Namgis Written Submissions, pp. 29-30.

[104] Namgis Written Submissions, p. 30. The First Nation cites the following decisions of the British Columbia Supreme Court in support of the proposition that, depending on the circumstances, the Crown may owe a fiduciary duty to consult with Indians before taking any action which might adversely affect their interests: *Delgamuukw v. British Columbia*, [1991] 3 WWR 97 (BCSC), rev'd [1993] 5 WWR 97 (BCCA), and *Ryan v. British Columbia (Ministry of Forests - District Manager)*, [1994] BCJ No. 2642 (SC).

> There simply was no valid reason for Indian Agent Halliday to put forth the position that he did with respect to this application for the McKenna McBride Commission. There were no competing interests of the Crown which needed to be considered, nor does it appear from the record that he had heard any other objections to the reserve allocation. If the land was unavailable, he should have said so. If that were the case, which there is no evidence to suggest that it was, his duty would have been to advise the Band in order that they could adjust their requests to the McKenna McBride Commission.[105]

With respect to Application 76, the First Nation asserts that Agent Halliday acted against the Band's best interests and breached his fiduciary duty by recommending that a maximum of 100 acres be allotted in relation to three large islands requested by the Band in the Plumper Island group. The First Nation argues that Agent Halliday was aware that the Band had an increasing population at the time and would need additional land. Given that the lands were vacant and adjacent to the main village at Alert Bay, the First Nation submits that Agent Halliday should have considered the Band's needs as pre-eminent and pressed for the reserve allotment sought by the Band.[106] Instead, Agent Halliday sought to limit the Band's allotment in the Plumper Island group and was, ultimately, successful.

Finally, with respect to the Pearse Island group covered by Application 77, the First Nation maintains that the evidence of the elders confirms that the Band used and needed these islands. Yet there is no evidence that Agent Halliday fulfilled his duty to consult with the Band regarding its request for the Pearse Islands. On the contrary, the First Nation submits that the evidence of the Chiefs at their meeting with the McKenna-McBride Commission on June 1, 1914, tends to indicate that he ignored their pleas and left them to fend for themselves before the Commission. Similar to its argument with respect to Application 76, the First Nation submits that there is no reason why Agent Halliday should not have supported the Band's application, considering that the lands were vacant. The First Nation also submits that, "despite what Indian Agent Halliday may have viewed as his role, based upon the term of his appointment, it was not his duty to be neutral but, rather, to put forth the best interests of the Band, particularly when their 'farming, grazing and woodlands, fisheries or other rights' would be adversely affected, as was the case here."[107]

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[105] Namgis Written Submissions, p. 31.

[106] Namgis Written Submissions, pp. 31-32.

Canada submits that reserve creation in British Columbia is a public law duty, not a private law duty, and therefore does not give rise to a fiduciary relationship. The political process employed for the purposes of reserve creation was not capable of being supervised by the courts of equity and could not give rise to an enforceable obligation.[108] Furthermore, Canada denies that any fiduciary obligations arose from the Indian Agent's instructions and his representations before the McKenna-McBride Commission. It claims that there was no statute, agreement, or unilateral undertaking by Canada to act for, on behalf of, or in the best interests of the Band in the circumstances of this claim. More specifically, Canada argues that:

- The instructions to Indian agents did not constitute a statute but an internal government directive, which, on their own, did not create fiduciary obligations by Canada towards Indian bands.

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[107] Namgis Written Submissions, p. 33.

[108] Submissions on Behalf of the Government of Canada, September 6, 1995, pp. 2, 16-17 (hereinafter referred to as "Canada's Written Submissions").

- The instructions to Indian agents did not constitute an agreement between the Band and Canada since there is no evidence that the Band was aware of the instructions or agreed with them.

- The instructions to Indian agents did not create a unilateral undertaking on the part of Canada to protect non-reserve lands or to obtain additional reserve lands for the Band. In particular:

    - There is no evidence that the Band knew of or agreed to the instructions in order to create a mutual understanding that the Crown would act solely on behalf of the Band.
    - The instructions do not disclose an intention by Canada to relinquish its own self-interest and to act solely on behalf of the Band. Rather, the instructions required the Indian agent to do a variety of tasks (for example, enforce section 149 of the *Indian Act* prohibiting Indian festivals, dances, or other ceremonies) which were not performed solely on behalf of the Band.
    - The reserve-creation process in British Columbia was a political process which required a joint decision of both the provincial and federal governments to allot lands for Indian bands.
    - The instructions were not broad enough to encompass non-reserve lands, and did not require the Indian agent to take any action with respect to non-reserve lands.[109]

In any event, Canada contends that it did not have the power or discretion to unilaterally affect the Band's legal or practical interests. First, as mentioned above, the creation of reserves in British Columbia required a joint decision by both the provincial and the federal governments. Second, Canada could not "control" the Commission's decisions – the Commission treated Agent Halliday as a witness to the Commission, in the same way that it treated Band members as witnesses to the Commission. Third, Agent Halliday's recommendations were largely ignored by the

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[109] Canada's Written Submissions, pp. 18-22.

Commission. Fourth, the Band was able to voice its views on its applications for additional reserve lands directly to the Commission. Fifth, the Commission asked for submissions from Agent Halliday only on lands that were originally requested by the Band.[110]

Finally, Canada argues that, since the Band was able to make its own representations before the McKenna-McBride Commission, it did not rely or depend on Agent Halliday to present its views to the Commission, nor was it vulnerable to him in this regard.[111]

In response to Canada's position on this issue, the First Nation submits that the whole purpose of the McKenna-McBride Commission was to settle finally the Indian land question and to establish the true needs of the various bands. Given the constitutional jurisdiction of the federal Crown in relation to Indians and lands reserved for the Indians in subsection 91(24) of the *Constitution Act, 1867*,[112] and Article 13 of the Terms of Union, Canada had an obligation to press for the establishment of reserves, the size, location, and number of which were sufficient for the present and future needs of the Band. While the First Nation acknowledges that the creation of reserves required a joint decision by the provincial and federal governments, it submits that the discretion exercised by Canada inhibited and prevented any possibility of most of the lands in question becoming reserves, particularly in relation to Applications 76 and 77, which were available to the Band. Finally, the First Nation maintains that, even if the Band was given an opportunity to present its views to the McKenna-McBride Commission, these views were given short shrift and, moreover, that Agent Halliday prevented the Band from ably making its case. Even though Agent Halliday was supposed to represent the interests of the Indians, his statements to the McKenna-McBride Commission were to the effect that they did not need the Woss lands under Application 73 and that they needed less than they asked for under Applications 76 and 77. Since great weight was placed on these statements, the First Nation argues that it was vulnerable to Agent Halliday's representations to the Commission.[113]

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[110] Canada's Written Submissions, pp. 22-26.

[111] Canada's Written Submissions, pp. 26-27.

[112] Subsection 91(24) of the *Constitution Act, 1867*, assigns exclusive legislative authority for "Indians, and Lands reserved for the Indians," to the Parliament of Canada.

Public versus Private Law Duty

In the Cormorant Island claim of the 'Namgis First Nation, Canada advanced a similar argument to that advanced here – namely, that reserve creation in British Columbia is in the nature of a public law duty, not a private law duty, and therefore does not give rise to legally enforceable fiduciary duties. We rejected that argument in our report into the Cormorant Island claim in light of the comments made by Mr. Justice Dickson (as he then was) in *Guerin v. The Queen*.[114] In that case, Mr. Justice Dickson acknowledged that public law duties do not typically give rise to a fiduciary relationship. This exception did not mean, however, that the Crown's obligation could never come within the scope of the fiduciary principle. Mr. Justice Dickson stated that the Indians' interest in their lands is an independent legal interest created by neither the legislative nor the executive branches of government. As a result, the Crown's obligation to the Indians with respect to that interest is not a public law duty, but rather "in the nature of a private law duty." He concluded that, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary. Mr. Justice Dickson also stated that the Indian interest in the land is the same whether it is the interest of an Indian band in a reserve or unrecognized aboriginal title in traditional tribal lands.[115]

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[113] Namgis Written Submissions, pp. 38-40.

[114] *Guerin v. The Queen* (1984), 13 DLR (4th) 321 (SCC).

We said in our Cormorant Island report that we understood Mr. Justice Dickson to be saying that there is an independent legal interest in the land even before a reserve is created. Any obligation with respect to that interest is in the nature of a private law duty. We found, therefore, that it was possible for an enforceable fiduciary obligation to arise in the reserve creation process.[116] We adopt the same reasoning here. The question that remains to be answered is whether Canada, in fact, had a fiduciary obligation in the circumstances of this claim.

Nature and Scope of Fiduciary Obligations

In arguing that Agent Halliday owed a fiduciary duty to the Band in relation to his recommendations to the McKenna-McBride Commission, the First Nation refers to a number of court decisions which discuss the fiduciary relationship between the Crown and the Indians: *Guerin v. The Queen*; *Kruger v. The Queen*; *R. v. Sparrow*; and *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*.[117] The First Nation also cites and applies some of the principles enunciated by Madam Justice Wilson in *Frame v. Smith* and by Mr. Justice La Forest in *Hodgkinson v. Simms*.[118]

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[115] *Guerin v. The Queen* (1984), 13 DLR (4th) 321 at 336-37 and 341.

[116] ICC, *'Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 68.

[117] *Guerin v. The Queen*, [1984] 2 SCR 335; *Kruger v. The Queen* (1985), 17 DLR (4th) 591 (FCA); *R. v. Sparrow* (1990), 70 DLR (4th) 385 (SCC); *Apsassin v. Canada (Department of Indian Affairs and Northern Development)* (1993), 100 DLR (4th) 504 (FCA).

In *Frame v. Smith*, Madam Justice Wilson proposed the following "rough and ready guide" to identify relationships where it is appropriate to impose fiduciary obligations:

> . . . there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[119]

In *Hodgkinson v. Simms*, Mr. Justice La Forest elaborated further on the approach proposed by Madam Justice Wilson. He there discussed three "uses" of the term "fiduciary," two of which are relevant for the purposes of this inquiry. Mr. Justice La Forest characterized the first use of the term "fiduciary" as follows:

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[118] *Frame v. Smith*, [1987] 2 SCR 99; *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC).

[119] *Frame v. Smith*, [1987] 2 SCR 99 at 136. Although Wilson J. wrote in dissent, her list of characteristics was adopted by a majority of the Supreme Court of Canada in subsequent cases. See, for example, *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 DLR (4th) 14 (SCC), per La Forest J. at 29, and per Sopinka J. at 62-63; *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC), *per* La Forest J. at 628, and per Sopinka and McLachlin JJ. at 666.

> The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are *per se* fiduciary, Wilson J.'s three-step analysis [in *Frame v. Smith*] is a useful guide.[120]

Although the First Nation refers only to the first use, the second use of the term "fiduciary" is described as follows by Mr. Justice La Forest:

> As I noted in [*International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 SCR 574], however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary," viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see supra, at p. 648. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.[121]

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[120] *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 629 (SCC).

[121] *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 629 (SCC).

Citing *Guerin v. The Queen* and *Frame v. Smith* (approved by *Hodgkinson v. Simms*), Canada sets out the law relating to fiduciary obligations in a slightly different manner from the First Nation:

> In order to have a fiduciary relationship which may give rise to a fiduciary obligation, the following three elements must be present:
>
> (a) a statute, agreement or unilateral undertaking to act for, on behalf of or in the interests of another person;
>
> (b) power or discretion can be exercised unilaterally to affect that person's legal or practical interests; and
>
> (c) reliance or dependence by that person on the statute, agreement or undertaking and vulnerability to the exercise of power or discretion.[122]

With respect to the term "undertaking," Canada emphasizes particular words used by Mr. Justice La Forest in *Hodgkinson v. Simms* in support of its (Canada's) argument that "the existence of a *unilateral undertaking* by the Crown giving rise to fiduciary duties is determined on the basis of the *mutual understanding* of both the Crown and the Indians that Canada has *relinquished its own self-interest* and agreed to act *solely* on behalf of the Indians."[123]

Canada offered the same test to determine whether a fiduciary obligation arose in the Cormorant Island inquiry of the 'Na̱mgis First Nation. However, we stated in that report that Canada's formulation of the appropriate test confused the case law.[124] As we saw it, the proper approach in the circumstances of that claim was to apply Madam Justice Wilson's "rough and ready guide" set out in *Frame v. Smith*. In other words, the first element of the three-part analysis was properly the "scope for the exercise of some discretion or power," and not the existence of "a statute, agreement or unilateral undertaking to act for, on behalf of or in the interests of another person."[125] We also had difficulty with Canada's argument that the existence of an "undertaking" was determined on the basis of a mutual understanding by both the Crown and the Indians that Canada had relinquished its own self-interest and agreed to act solely on behalf of the Indians. We stated:

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[122] Canada's Written Submissions, pp. 14-15.

[123] Canada's Written Submissions, p. 15. Emphasis added by Canada.

> Contrary to Canada's suggestion, we do not see Mr. Justice La Forest's statement [in *Hodgkinson v. Simms*] regarding a "mutual understanding that one party has relinquished its own self-interest . . ." as defining the circumstances in which an "undertaking" will give rise to a fiduciary obligation in the context of a *Guerin*-type or *Frame v. Smith*-type analysis. Rather, this statement is an elaboration of the second use of the term "fiduciary." As we understand Mr. Justice La Forest's reasons, fiduciary obligations may arise where *either* the first use *or* the second use of the term is involved. Therefore, if the relationship falls within the *Frame v. Smith* analysis (in other words, it falls within the first use of the term), it is unnecessary to establish that there is a "mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party."[126]

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[124] ICC, *'Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 70.

[125] ICC, *'Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 73.

[126] ICC, *'Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 74.

In our view, the same comments are equally fitting in the context of this claim. We therefore decline to follow the approach suggested by Canada for the existence of a fiduciary relationship.

As a starting point, it is important to bear in mind that the Supreme Court of Canada and other courts have characterized the relationship between the Crown and the aboriginal peoples of Canada as fiduciary in nature. Mr. Justice Iacobucci stated this view in clear and succinct terms in the Supreme Court of Canada decision of *Quebec (Attorney-General) v. Canada (National Energy Board)*:

> It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. Canada* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, 20 E.T.R. 6. None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.[127]

Thus, it would appear that the Supreme Court of Canada accepts the basic premise that the relationship between Canada and First Nations is inherently fiduciary in nature. In this sense, the Crown-aboriginal relationship falls within the established categories of fiduciary relationship such as trustee-beneficiary and agent-principal and gives rise to a rebuttable presumption that one party has a duty to act in the best interests of the other. However, Mr. Justice Iacobucci was also clear that "not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation . . . The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed."[128]

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[127] *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at p. 147 (SCC).

The task before us, then, is to delineate the scope and content of Indian Agent Halliday's fiduciary duties to the Band, based on the particular facts of this claim. To assist in this task, we find it useful to examine the factual circumstances of this claim in accordance with the three general characteristics of fiduciary relationships identified in *Frame v. Smith*. We also find it helpful to examine the nature of the relationship from the perspective of three different points in time. Therefore, we have focused on the relationship between the Indian Agent and the Band prior to, during, and after the McKenna-McBride hearings to determine whether any particular fiduciary duties arise under the circumstances of this claim.[129]

Fiduciary Duty prior to the McKenna-McBride Hearings

One of the prominent features of the Commission's operations was its meetings throughout British Columbia with all or most of the province's tribes and bands. It was at these community meetings that the tribes and bands were afforded the opportunity to tell the Commissioners first hand their views on a number of matters and to submit their applications for additional reserve lands. At the risk of stating the obvious, it stands to reason that the more prepared the bands were for the Commissioners' visit, the greater their ability to present thorough and compelling applications for reserve land. It is in this regard that the Indian Agent had the capacity to play a pivotal role.

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[128] *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at p. 147 (SCC). Further support for this view can be found in Mr. Justice La Forest's statement in *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 632 (SCC), that "the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, '*There is no substitute in this branch of the law for a "meticulous examination of the facts"*' . . ." Emphasis added.

[129] The reference to "the McKenna-McBride hearings" includes both the Commission's hearings with the tribes of the Kwawkewlth Nation on June 1 and 2, 1914, and the Commission's hearings with Indian Agent Halliday on June 24, 1914.

One of the primary responsibilities of the Indian Agent was to provide advice to the bands under his charge. Superintendent Vowell's "Instructions to Indian Agents" in 1909 bear witness to this important responsibility:

> The duties of Agents mainly consist *in advising the Indians*, and in protecting them in the possession of their farming, grazing and woodlands, fisheries or other rights, and preventing trespass upon or interference with the same . . .
>
> . . .
>
> As the Department has no treaty payments to make to the Indians of British Columbia and it proposes doing away entirely with the system of giving presents to them there will be little other responsibilities attaching to the position of Indian Agent than the ordinary care of the interests of the Indians, and their protection from wrongs at the hands of those of other nationalties [sic]. The Agent should constantly *advise and instruct the Indians* in the beneficial use and occupations of their farming, grazing and woodland, fisheries or other privileges or industries possessed or pursued by them; and they, the Agents, should take measures to prevent trespass or intrusion by white people or Indians of other tribes or bands on the reserves, fisheries, etc., within their Agencies, etc. . . .[130]

The Chairman's remarks during the Commission's general meeting with the principal tribes of the Kwawkewlth Nation on June 1, 1914, affirm the importance of the Indian Agent's advisory role:

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[130] A.W. Vowell, Superintendent of Indian Affairs, British Columbia, to J.A. McIntosh, Indian Agent, covering letter along with memorandum entitled "Instructions to Indian Agents," December 22, 1909 (ICC Documents, pp. 26-27). Emphasis added.

> The Indian Agent's [sic] are appointed and paid by the Dominion Government. Their duty is to stand by and protect the Indians in all their rights – to visit the Reserves from time to time and see that no one is interfered with them in their privileges; *To be their friend and to give them good advice; To tell them what it is best for them to do and to look after them as a father would his children.* It is also his duty to prevent them from disobeying the laws; To prevent them if possible from doing what is wrong; To explain the law to them and see that it is enforced and to keep them informed as to the mind of the Government. . . .[131]

It is true that the 1909 Instructions and the Chairman's description of the Indian Agent's duties do not explicitly say that the Indian Agent was to provide advice in relation to the McKenna-McBride process. However, given the critical importance of land and the impact of the process on the Band's present and future interests, it defies common sense to suggest that the Indian Agent's general advisory role stopped short of providing the bands with information and assistance vital to their effective participation in the process.

In the language of the "rough and ready guide" in *Frame v. Smith*, Agent Halliday had a unilateral discretion or power to do a number of things prior to the Commission's visit to Alert Bay. First, he could have distributed the plans of the Band's lands that were lying in his office to the Chief and councillors prior to the hearings. Second, he was in a position to determine which lands were alienated and to relay this information to the Band. Third, he could have told the Band about the process (what the Commission was doing, why the Commission was coming to the community, what lands the Band could seek) and he could have advised Band members on how to participate most effectively in the process. If the Band had been furnished with this advice and information, it would have been in a much better position to assert its own interests. The Band would have been able to compile a thorough list of available lands and to make persuasive arguments that specific lands were important for the Band's present and future needs. Although it would not have been an onerous task to provide the Band with this information and advice, the evidence is that Agent Halliday did none of these things to assist the Band in preparing its applications for submission to the Commission.

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[131] Chairman, Royal Commission, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 89 (ICC Documents, p. 80). Emphasis added.

Under the circumstances, it is clear that the Band was peculiarly vulnerable to the exercise of Agent Halliday's discretion. On the evidence before us, it appears that the Band had no other reasonable and practical way of obtaining information about its lands and the process. We acknowledge that the Commission, itself, provided information to the Band once it arrived in Alert Bay. However, it is important to remain cognizant of the amount of time available to the Band to digest and make sense of the information provided by the Commission. The evidence of Chief Owahagaleese was that he received the plan of his land on Saturday night. The Commission commenced its first day of hearings on the following Monday. Assuming that all the bands in the Kwawkewlth Agency received information about the process at the same time as Chief Owahagaleese, the Nimpkish Band barely had a full day to prepare. In our view, this information was too little, too late, to be of any real benefit to the Band.

But could the exercise of Agent Halliday's discretion affect the Band's legal or practical interests? In our view, the exercise of Agent Halliday's discretion could and, in fact, did affect the legal and practical interests of the Band. It is clear that Agent Halliday's failure to disclose information that was readily available to him, and to provide advice to the Band on its available options, had the potential to affect the breadth and quality of the Band's applications for additional reserve lands and, thus, its ability to receive favourable recommendations from the Commission.

If Agent Halliday had properly prepared the Nimpkish Band for the process, it is likely that Chief Lageuse would have requested other lands which were not alienated to third-party interests and that he would have provided greater detail regarding the use and importance of the lands to justify these applications. This is a fair inference, since Chief Lageuse stated that his land applications represented less than one-quarter of his ancestors' village sites. If other lands were available and reasonably required by the Band, there is every reason to believe that the Commission would have allotted the lands as additional reserve lands. The mandate of the Commission was, after all, to set aside a sufficient quantity of land for the present and future needs of the Indians. In this sense, we are of the view that Agent Halliday did have a fiduciary obligation to prepare the Band for the McKenna-McBride process. A failure to do so was a breach of that obligation. We are mindful, however, that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. Therefore, if all alternative lands were alienated, the Band probably would not have fared any better in the process even if Agent Halliday had provided basic information and advice.

Bearing in mind the constraints on the McKenna-McBride Commission with respect to alienated lands, we propose the following guidelines for determining whether or not the Band has a valid specific claim against Canada as a result of the Indian Agent's conduct prior to the McKenna-McBride hearings. In our view, the Band has a valid specific claim if it can establish a *prima facie* case that (1) the Indian Agent failed to prepare the Band for the McKenna-McBride process; (2)

unalienated lands were available which the Band could have applied for; and (3) the lands were reasonably required by the Band. If these conditions are satisfied, it should be presumed that the Commission would have allotted the lands as additional reserve lands. Although the presumption is rebuttable, the onus should be on Canada to demonstrate on a balance of probabilities that the McKenna-McBride Commission would not have allotted the lands as additional reserve lands if the lands had been requested by the Band.

In the circumstances of this claim, we are satisfied that Agent Halliday failed to disclose material information and to provide basic advice to the Nimpkish Band to assist it in its preparations for the McKenna-McBride hearings. Although this information was readily available to Agent Halliday and would not have been an onerous task on his part, he offered little or no information to the Band to assist it during this important process. The words of Chief Willie Harris at the general meeting of the principal tribes on June 1, 1914, are particularly telling:

> . . . we ought to have an Agent here who will tell the people here what the mind of the Government is and if there is any privileges. The Indians ought to have been fully instructed about these things - The few minutes that we have been listening to you our eyes have been opened, and the Indian Agent ought to have told us about all those things. You ought to have seen us in the general meeting this morning before you came - We had the plans, and one would say (Referring to the Indian Reserves on the plans) "where is it" "whose is it" and we cannot tell you. We want to show you how helpless we are, and we think the Indian Agent should have told us about all these things.[132]

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[132] Willie Harris, Chief of the Nimkish Tribe, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 89 (ICC Documents, p. 80).

Even the Chairman of the McKenna-McBride Commission noted Agent Halliday's shortcomings in this regard, stating that the plans of the Chiefs' lands were "lying in the office of the Indian Agent who failed to distribute them . . . as ought to have been done."[133]

We are also satisfied that additional lands were reasonably required by the Band. The McKenna-McBride Commission stated in its report that the reserves of the Kwawkewlth Agency, as described in the Official Schedule of 1913, numbered 91, with an aggregate area of 16,600.99 acres. This gave a per capita average of 14.03 acres for the Agency population of 1183.[134] In contrast, the Nimpkish had a per capita average of 3.4 acres.[135] Even after the Band received 70 additional acres in the Plumper Island group and 60 additional acres in the Pearse Island group, it still had a per capita average of only 4.2 acres. Considering that the Nimpkish Band "was one of the few in the Agency increasing numerically . . . and required room for expansion,"[136] it seems reasonable to conclude that the Band was left with insufficient lands.

It is unclear, however, whether there were unalienated lands available in 1914 which the Band could have applied for. Since, on the evidence before us, the Band has not established a *prima facie* case that such lands were available, in our view it has not established that it has a valid specific claim on this basis. If supplementary research can confirm that such lands were available in 1914, it should be presumed that the McKenna-McBride Commission would have allotted additional reserve lands. Although it is not clear how much land the Commission would have allotted to the Band in 1914, this is a matter which could provide a valid basis for negotiations under the Specific Claims Policy.

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[133] Chairman, Royal Commission, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 86 (ICC Documents, p. 77).

[134] Final Report, Royal Commission on Indian Affairs for the Province of British Columbia, June 30, 1916 (ICC Documents, p. 160).

[135] Kwawkewlth Agency - Additional Lands Applications (ICC Documents, p. 1).

[136] Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 130).

Fiduciary Duty during the McKenna-McBride Hearings

A second prominent feature of the Commission's operations was its separate interview with the local Indian Agent after visiting the reserves in his agency. At this interview, the Agent was asked to review the applications of the various tribes and bands and to provide his recommendations. The First Nation takes the position that it was not Agent Halliday's duty to be independent during this process, but rather to act as an advocate on behalf of the Band.[137] Canada disagrees. Mr. Becker stated as follows in his oral submissions:

> The Indians were able to make submissions directly to the McKenna-McBride Commission. They did not need the Indian Agent to represent them before the Commission, and in fact the Commission obviously intended that the Indian Agent speak of the Indian Agent's personal opinions. Otherwise why would they even have called the Indian Agents in? I mean, they already knew what the bands wanted. They had heard directly from the bands: we want application x, y, z. They wanted to hear independently from the Indian Agent in terms of what the Indian Agent thought.

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[137] ICC Transcript, September 20, 1995, pp. 19 and 99 (Stan Ashcroft).

> This is not the context where anyone expected the Indian Agent to go in and effectively parrot what the band wanted. That would have added nothing.[138]

We agree with Canada that Agent Halliday did not have a duty to "parrot" the Band's submissions, even if he did not agree with them. His evidence was given under oath, which demanded that he tell the truth and provide his honest opinion on what the present and future land needs of the Band were when he was making his recommendations. This does not mean, however, that Agent Halliday did not have any obligations in relation to the Band. Given the nature of his responsibilities as the Indian Agent, Mr Halliday should have informed himself about the Band's true land requirements so that he could provide reasonable and well-informed recommendations to the Commission. In order to inform himself of the Band's *bona fide* land requirements, Agent Halliday would have been required to consult with the Band and conduct investigations into the quality, availability, and potential use of various lands.

Canada contends, however, that Agent Halliday could not unilaterally affect the Band's legal or practical interests. It argues that Agent Halliday, like the Band, was simply a witness in the process; the Commission and ultimately the two levels of government were the decision makers and, in some cases, Agent Halliday's recommendations were not followed. We agree that Agent Halliday was not the final decision maker. However, in our view, Canada's position improperly minimizes the importance attached to Agent Halliday's testimony and his actual influence over the final decision of the Commission.

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[138] ICC Transcript, September 20, 1995, p. 64 (Bruce Becker).

Following oral submissions in this inquiry, both parties submitted further reports analyzing the correlation between Agent Halliday's recommendations and the Commission's decisions for the entire Kwawkewlth Agency.[139] After carefully studying these reports, it appears to us that most, if not all, of Agent Halliday's negative recommendations resulted in the Commission rejecting the application, even if it did not always reject the application for the same reason as Agent Halliday. In addition, it appears that a substantial majority of Agent Halliday's positive recommendations (in relation to lands that were available) resulted in the Commission allotting *some* land, even if it did not always allot the same amount of land recommended by Agent Halliday. These results lead us to conclude that Agent Halliday did, in fact, wield considerable influence in the process. This conclusion is strengthened by the fact that the Commission returned to Agent Halliday for further recommendations after it was discovered that some of the lands he recommended in the initial applications were alienated. It stands to reason that the Commission must have placed some weight on Agent Halliday's opinions; otherwise, there would have been no need to ask him for further recommendations.

Canada also contends that the Band was not vulnerable to the exercise of Agent Halliday's power or discretion because it was able to make its own representations before the Commission. We cannot accept this argument. Even though the Band was able to speak on its own behalf, it was still vulnerable, owing to its lack of preparation for the process. In other words, the fact that the Band was able to address the Commission directly did not mean that it was able to represent its needs and interests in an effective way. In effect, Agent Halliday's failure to prepare the Band for the Commission's hearings tainted the whole process. In addition, as discussed above, it appears that the Commission was reluctant to allot lands without some endorsement from the Agent. Surely this record indicates that the Band was vulnerable to the exercise of the Agent's discretion.

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[139] Stan H. Ashcroft to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, October 12, 1995, enclosing report prepared by Dr. John Pritchard (ICC file 2109-5-1); Rosemarie Schipizky to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, March 12, 1996, enclosing report prepared by Specific Claims West, DIAND, entitled, "The McKenna-McBride Commission: A Review of the Land Applications of the First Nations within the Kwawkewlth Agency, 1914-1916" (ICC file 2109-5-2).

In sum, it is apparent that Agent Halliday had considerable influence in the process, given his role as the Indian Agent for the Kwakewlth Agency. He was expected to inform himself about prevailing social conditions, band population figures, land quality and availability, land areas presently used and occupied by the bands, and lands they might reasonably require in the future. Under the circumstances, we are of the view that he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission. A failure to do so was a breach of that obligation. Simply put, Agent Halliday's failure to inform himself had an adverse impact on the Band's applications for land, and the consequences have been felt for generations among the 'Nagmis people.

As before, we are mindful that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. We therefore propose the following guidelines for determining whether or not the Band has a valid specific claim against Canada as a result of the Indian Agent's conduct during the McKenna-McBride hearings. The Band has a valid specific claim if it can establish a *prima facie* case that (1) a reasonable person acting in good faith would have provided a different recommendation to the Commission if that person had consulted with the Band and made other appropriate investigations; and (2) the relevant lands were unalienated. If these conditions are satisfied, it should be presumed that the Commission would have allotted some or all of the lands encompassed by that different recommendation, providing that the lands were reasonably required by the Band. The onus is on Canada to rebut the presumption on a balance of probabilities.

On the basis of the evidence given by Chief Lageuse on June 2, 1914, and the evidence given to us at the community session on April 20 and 21, 1995, we are of the view that, if Agent Halliday had consulted with the Band before making his recommendations to the Commission, he would have discovered that all the lands encompassed by Application 76 (the Plumper Islands) and Application 77 (the Pearse Islands) were actively used by the Band and were of importance to them. We therefore find that a reasonable person acting in good faith would have recommended for reserve status all the islands requested by the Band. According to the notations made by the Commission, all of the lands encompassed by Application 76 were "open and available." Accordingly, it should be presumed that the Commission would have allotted some or all of the two Plumper islands that were not included in its final decision. The Commission's notations with respect to Application 77 state that the lands were "*partially* open and available." Again, the Band has not provided sufficient evidence that the particular lands sought in its specific claim in relation to Application 77 were unalienated. This is a necessary pre-condition before it can be presumed that the Commission would have allotted some or all of the lands as additional reserve lands.

The situation with respect to Application 73 (Woss) is more complex. We heard evidence at the community session that the area around Woss was important for gathering and preserving fish and for trading. Presumably, if Agent Halliday had consulted with the Band, he would have obtained similar information. However, we also have the evidence of Chief Lageuse that it had been approximately 50 years since Band members had had a permanent village there and that they had not used it in the meantime for any purpose. Given the evidence of Chief Lageuse that the area had not been used for a number of years, we can see why a reasonable person acting in good faith might have made the same recommendation as Agent Halliday if it was absolutely clear that the Commission would allot the lands sought under Application 72 to extend the area of Indian Reserve 3. However, this outcome was not at all clear, since the lands requested under Application 72 were covered by a timber limit. Not only was the area around Woss an old village site and important for food gathering and trade but the evidence confirms that it was also significant in terms of 'Namgis culture and traditions. Therefore, it is a reasonable likelihood that the Band would have used the area since it was unable to obtain the lands sought under Application 72. In our view, a reasonable person acting in good faith would have recommended Application 73 at Woss in addition to, or at least in the alternative to, Application 72.

Having said that, we think it is unclear whether the lands encompassed by Application 73 were unalienated. Just prior to the oral hearing, Canada submitted evidence that they were not. The Band was unwilling to accept Canada's evidence without further research.[140] We recommend that the Band undertake that research and, if it can be shown that the lands encompassed by Application 73 were unalienated, it should be presumed that the Commission would have allotted some or all of the lands as additional reserve lands.

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[140] ICC Transcript, September 20, 1995, pp. 6-13 (Stan Ashcroft, Bruce Becker, Rosemarie Schipizky).

Fiduciary Duty after the McKenna-McBride Hearings

As mentioned above, when the Commission became aware that many of the lands recommended by Agent Halliday were alienated, the Commission returned to him and asked if he wished to reconsider his opinion with regard to any of the applications he had not endorsed. As we see it, Agent Halliday had, at the very least, the same fiduciary obligation at this stage of the process as he had during the hearings; that is, he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission. If anything, the Band's vulnerability was more acute at this stage, since the Commission returned only to Agent Halliday for further representations and did not seek the input of the Band on alternative land applications.

In determining whether or not Agent Halliday's recommendations were reasonable at this stage, it is crucial to take into account that he now had more information. Clearly, he was aware that many of the lands he had recommended were alienated and unavailable. Thus, even if a particular recommendation was reasonable in June 1914 when Agent Halliday first appeared before the Commission, it cannot be automatically assumed that it was still a reasonable recommendation in the context of this new information.

In the circumstances of this claim, Agent Halliday knew at the time he was making his revised recommendations that the Commission was unwilling or unable to allot the lands encompassed by Application 72. Since Agent Halliday, himself, believed that the Band required room for expansion, one would think that a reasonable person would have attempted to match as closely as possible the lost acreage from Application 72 (500 acres). In terms of the Band's original applications, this would have required a revised recommendation that included all or most of Applications 73, 76, and 77, depending on the total acreage in the Plumper and Pearse Island groups. Therefore, as discussed above, it should be presumed that the Band has a valid claim for negotiation with respect to Application 76 since the lands were "open and available" The same should be presumed with respect to Applications 73 and 77, if the Band can provide evidence that the lands sought in its specific claim were unalienated.

Before leaving this issue, we would like to address briefly Canada's argument that Agent Halliday was restricted in the lands he could recommend at this stage of the process. Canada contends that, "[w]hen the Commission became aware that one of the Band's application [sic] which the Indian Agent had recommended was alienated, the Commission *only* requested the Agent's views on the *original applications of the Band* which he had not endorsed in the first instance. . . . The Commission did not give the Indian Agent free reign to recommend lands which the Band had not applied for."[141] It is not clear on the evidence whether Agent Halliday was, in fact, restricted to the original applications of the Band. Even if Canada is correct, however, it is unnecessary for us to decide this point, for it simply returns us full circle to Agent Halliday's obligation to prepare the Band for the process. If the Band had been properly prepared for the process and had asked for more available lands, Agent Halliday would have had a larger land base from which to make his revised recommendations.

Issue 2

Did the McKenna McBride Commission or its agent Ashdown Green owe a fiduciary duty to the Band in relation to their deliberations and investigations with respect to the Band's

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[141] Canada's Written Submissions, p. 26. Emphasis added by Canada.

applications for additional reserve lands? If so, did they breach that duty in relation to:

a) Application 73
b) Application 76
c) Application 77[142]

The First Nation submits that the McKenna-McBride Commission and its agent, Ashdown Green, owed a fiduciary duty to the Band "to closely examine what were in the best interests of the Band and, if there were no competing interests which should be given pre-eminence, then they should have given priority to the requests of the Band."[143] It bases this argument on the following documents: (1) Article 13 of the *Terms of Union, 1871*; (2) the McKenna-McBride Agreement of September 24, 1912 (in particular, subsection 2(*b*)); and (3) the federal Order in Council of November 27, 1912, which confirmed the McKenna-McBride Agreement.[144]

Canada denies that the McKenna-McBride Commission and those working for it, such as Mr. Ashdown Green, owed a fiduciary duty to the Band. It relies on the decision of the Supreme Court of Canada in *Quebec (Attorney-General) v. Canada (National Energy Board)*[145] in support of its position.[146]

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[142] Although this issue was raised in the First Nation's written submissions, it was not raised in the First Nation's earlier summary of the claim or at the planning conference. At the oral hearing, Canada requested and was granted an opportunity to provide further written submissions on this portion of the First Nation's argument.

[143] Namgis Written Submissions, p. 33.

[144] Namgis Written Submissions, pp. 33-34.

[145] *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 (SCC).

[146] Supplementary Submissions on Behalf of the Government of Canada, October 31, 1995.

In the *National Energy Board* (*NEB*) case, the Supreme Court of Canada was asked to consider whether the National Energy Board owed a fiduciary duty to the Grand Council of the Crees (of Quebec) and the Cree Regional Authority (the "appellants") when the Board granted licences to Hydro-Québec for the export of electrical power. The appellants argued that the fiduciary duty owed to aboriginal peoples by the Crown extended to the Board, as an agent of government and a creation of Parliament, in the exercise of its delegated powers. They contended that this duty applied whenever the decision made pursuant to a federal regulatory process was likely to affect aboriginal rights, and that it included the duty to ensure the full and fair participation of the appellants in the hearing process and the duty to take into account their best interests when making decisions.

The Supreme Court of Canada rejected the appellants' argument. Mr. Justice Iacobucci, speaking for the Court, stated:

> It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. Canada* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, 20 E.T.R. 6. None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. The courts must be careful not to compromise the independence of *quasi*-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.
>
> Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an

obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is *quasi*-judicial: *Committee for Justice and Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 at p. 728, [1978] 1 S.C.R. 369, 9 N.R. 115. While this characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.

It is for this reason that I do not find helpful the authorities cited to me by the appellants as indicative of this evolving trend: *Gitludahl v. Minister of Forests*, B.C.S.C., August 13, 1992, Vancouver Registry No. A922935, unreported; and *Dick v. The Queen*, F.C.T.D., June 3, 1992, Ottawa Court File No. T-951-89, unreported [now reported [1993] 1 C.N.L.R. 50, 33 A.C.W.S. (3d) 1029 *sub nom. Wewaikai Indian Band v. Canada*]. Those cases were concerned, respectively, with the decision-making of the Minister of Forests, and the conduct of the Crown when adverse in interest to aboriginal peoples in litigation. The considerations which may animate the application of a fiduciary duty in these contexts are far different from those raised in the context of a licence application before an independent decision-making body operating at arm's length from government.

Therefore, I conclude that the fiduciary relationship between the Crown and the appellants does not impose a duty on the Board to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose superadded requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of fiduciary duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the Board.[147]

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[147] *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at pp. 147-48 (SCC).

The First Nation argues that the situation at issue in this claim is very different from that at issue in the *NEB* case:

> In this case, the McKenna McBride Commission was not a quasi-judicial Board or tribunal with competing interests to examine. On the contrary, it was to look at the needs of the Indians, both for the present and the future pursuant to its mandate. In the *Cree* [*NEB*] case, the National Energy Board's decisions only impacted upon the Band's aboriginal interests in land indirectly, whereas in this case, the decisions made by the McKenna McBride Commission impacted directly upon the Namgis First Nation's rights to land. As well, unlike the National Energy Board, which is an independent decision-making body pursuant to statute, the McKenna McBride Commission was set up to specifically deal with the Indian land question pursuant to the *Enquiries Act* of Canada. As well, its decisions were subject to a final decision being rendered by the Federal and Provincial governments.[148]

It is true that there are some distinctions between the McKenna-McBride Commission and the tribunal at issue in the *NEB* case. As Canada and the First Nation both note, the McKenna-McBride Commission was set up as a commission of inquiry under Part I of the *Inquiries Act*, RSC 1906, c. 104. This is clear from the federal Order in Council of November 27, 1912, which confirmed the McKenna-McBride Agreement. It states in part:

> The Minister of Justice . . . observes that the Agreement contemplates the constitution of a Commission with certain powers, and confirmation of the proceedings of the Commission by the two Governments;
>
> That the statutory authority of your Royal Highness-in-Council to constitute this Commission is to be found in Part 1 of the Enquiries

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[148] Namgis Written Submissions, pp. 36-37.

> [sic] Act, Revised Statutes of Canada, 1906, Chapter 104, and it appears to the Minister that in view of the Statutory provisions the proceedings of the Commission must be subject to approval.[149]

Commissions of inquiry are not courts[150] and, according to a number of authorities, are not (generally speaking) quasi-judicial tribunals.[151]

Canada acknowledges that the Supreme Court of Canada was dealing with a quasi-judicial tribunal in the *NEB* case. However, it submits that a commission set up under Part I of the *Inquiries Act* (such as the McKenna-McBride Commission) is an independent body which no more owes fiduciary duties to Indian bands than do quasi-judicial tribunals or the courts.[152]

Canada provided us with several articles in support of its position that a commission of inquiry is an independent body. For example, in a paper delivered to a conference prior to his appointment to the Supreme Court of Canada, Mr.

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[149] Federal Order in Council, November 27, 1912 (ICC Documents, p. 49).

[150] See, for example, Frank Iacobucci, QC, "Commissions of Inquiry and Public Policy in Canada," in A. Paul Pross, Innis Christie, and John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990), 24; Russell J. Anthony and Alastair R. Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985), 3; Gordon F. Henderson, QC, "Abuse of Power by Royal Commissions," in Special Lectures of the Law Society of Upper Canada, *The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control* (Toronto: Richard De Boo Limited, 1979), 500.

[151] See, for example, Russell J. Anthony and Alastair R. Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985), 155; Gordon F. Henderson, QC, "Abuse of Power by Royal Commissions," in Special Lectures of the Law Society of Upper Canada, *The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control* (Toronto: Richard De Boo Limited, 1979), 527.

[152] Supplementary Submissions on Behalf of the Government of Canada, October 31, 1995, p. 5.

Justice Iacobucci made the following comments in relation to commissions of inquiry:

> The basic structure of federal commissions of inquiry is established by Part I of the *Inquiries Act* . . . . Legislative provision is now made for such inquiries in the provinces as well.
>
> Under the various legislative schemes, the objective of commissions of inquiry is to respond to the needs of the executive branch of government by investigating and advising independently and impartially on assigned issues.[153]

Similar statements can be found in an article written by Professor A. Wayne MacKay:

> The mandates of commissions of inquiry are as varied as the orders in council or other legal mechanisms used to establish them. Some of the tasks to be carried out would normally include: ascertaining the facts, identifying the relevant issues, researching problems, educating the public on certain issues and making recommendations on matters of public policy. While created by government, one of the major attractions of an inquiry as an instrument of public policy is its independence from the governments of the day. They are special creations of the executive branch but are not answerable to it, as is a regular government department. Terms of reference for commissions of inquiry are usually broadly stated and governments have little control over the shape or direction of the inquiry.[154]

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[153] Frank Iacobucci, QC, "Commissions of Inquiry and Public Policy in Canada," in A. Paul Pross, Innis Christie, and John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990), 23.

[154] A. Wayne MacKay, "Mandates, Legal Foundations, Powers and Conduct of Commissions of Inquiry," in A. Paul Pross, Innis Christie, and John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990), 34.

We note, as well, the observations of Mr. Gerald Le Dain who, at the time of his remarks, was the Chairman of the Commission of Inquiry into the Non-Medical Use of Drugs, but who later became a Justice of the Supreme Court of Canada:

> A commission of inquiry established under Part I of the federal Inquiries Act is an independent body which, as a matter of formal relation, is on an equal footing with the other institutions of government. Once appointed it is not subject to anyone's direction or supervision. It is not under any degree of ministerial control although it is dependent on the government for its finances and, in theory, its mandate could be revoked by order in council. In practice it is allowed to peter out.
>
> . . .
>
> Because of its independent status it is neither necessary nor appropriate that a commission of inquiry be subject to political influence or pressure. . . . Of course, at the end of the day, its independence is what the commission makes of it. The true extent of its independence in practice will depend very much on the personalities of its members.
>
> What should be the attitude of the government towards responsibility for the work of a commission and its report? The government is responsible for the decision to establish a commission, but it should not act as if it is responsible for its report. The report is the act of an independent body. The government should simply allow it to be made public and reserve its judgment. . . . The government's political judgement in appointing a commission may be called in question, but if the commission has been truly independent of government, as it should be, I fail to see why government should assume responsibility for its acts.
>
> To whom then is a commission of inquiry accountable? It must develop some sense of its ultimate responsibility. The order in council appointing it requires it to report to the government or to a designated minister. Ultimately, I believe, it is accountable to the public. This is particularly true where it has been appointed because of a matter of public concern. Its function is to inform the public, to clarify the

> issues, and to promote understanding of a problem. It really speaks to the public through its report to the government.[155]

From our reading of the *NEB* case, one of the key elements behind Mr. Justice Iacobucci's decision was the National Energy Board's status as an "independent" body "operating at arm's length from government." Given the independent nature of commissions of inquiry (as illustrated by the authorities cited above), we agree with Canada that the reasoning of the *NEB* case can logically be extended to a commission such as the McKenna-McBride Commission. Accordingly, we find that the McKenna-McBride Commission and its agent, Ashdown Green, did not owe a fiduciary duty to the Band.

NEGLIGENCE

Issue 3

Did Indian Agent Halliday owe a duty of care to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands?

Issue 4

If so, was Indian Agent Halliday negligent in failing to fulfil that duty in relation to:

a) Application 73
b) Application 76
c) Application 77

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[155] Gerald E. Le Dain, "The Role of the Public Inquiry in Our Constitutional System," in Jacob S. Ziegel, ed., *Law and Social Change* (Toronto: Osgoode Hall Law School, 1973), 81-82.

Issue 5

> **If Indian Agent Halliday was negligent, did his actions or inaction cause the loss of the lands sought by the Band pursuant to:**
>
> **a) Application 73**
> **b) Application 76**
> **c) Application 77**

Issues 3, 4, and 5 all deal with the First Nation's alternative claim that Indian Agent Halliday was negligent in failing to protect and further the best interests of the Band. Given our findings and conclusions with respect to fiduciary duty in Issue 1, we do not find it necessary to consider these issues.

SPECIFIC CLAIMS POLICY

Issue 6

> **Does this claim fit within the parameters of the Specific Claims Policy?**

Canada contends that this claim does not relate to obligations of the federal government undertaken under treaty, requirements spelled out in legislation, or responsibilities regarding the management of Indian assets and, therefore, does not fall within the subject matter of a specific claim as set out in the Specific Claims Policy.[156] In particular, Canada argues that this claim does not relate to any of the four circumstances enumerated on page 20 of *Outstanding Business*.[157] For convenience, we repeat the relevant passage here:

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[156] Canada's Written Submissions, p. 12.

[157] Canada's Written Submissions, p. 12.

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.[158]

First, Canada submits that this claim does not relate to a treaty or an agreement between the Indians and the federal Crown. Second, it argues that the Instructions to Indian Agents were an internal government directive and do not form the basis of a statutory instrument. Finally, Canada maintains that the third and fourth circumstances do not apply: "As the Band's claim relates to lands which were not set apart as reserve for the Band, they are not an Indian asset under the policy nor are they Indian lands."[159]

Canada adds that, if the Band is alleging that Application 73 and the rejected parts of Applications 76 and 77 are nonetheless Indian assets or Indian lands, owing to the traditional use of the lands by the Band, the appropriate manner to deal with the claim is through the British Columbia Treaty Commission process.[160] Ms. Schipizky, counsel for Canada, noted in her oral submissions that the Specific Claims Policy specifically excludes claims based on unextinguished native title.[161]

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[158] *Outstanding Business*, 20.

[159] Canada's Written Submissions, p. 12.

The First Nation submits that its claim falls under the first two enumerated circumstances on page 20 of *Outstanding Business*. First, the First Nation argues that the McKenna-McBride Agreement, and the subsequent hearings conducted under the Agreement, constituted an "agreement between Indians and the Crown." It contends that Canada "failed to fulfil its part of the bargain by having an Indian Agent who, rather than represent its interests, gave testimony which, in fact, was detrimental to its interests."[162] Second, the First Nation asserts that its claim relates to the second enumerated circumstance: "the position and role of Indian Agents were established in the *Indian Act* and their duties and obligations were, pursuant to the *Indian Act*, set forth in the various instructions to Indian Agents. Indian Agent Halliday failed to fulfil these duties and obligations."[163]

In our report into the Cormorant Island claim of the 'Namgis First Nation, we discussed at some length our position that the four enumerated circumstances of "lawful obligation" on page 20 of *Outstanding Business* are only examples of Canada's lawful obligations and are not intended to be exhaustive. More specifically, we found that Canada's fiduciary obligations are "lawful obligations" within the meaning of the Policy.[164] We see no reason to change our position here.

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[160] Canada's Written Submissions, pp. 12-13.

[161] ICC Transcript, September 20, 1995, p. 57. Ms. Schipizky referred to p. 30 of *Outstanding Business*.

[162] Namgis Written Submissions, p. 45.

[163] Namgis Written Submissions, p. 45.

Taking into account the broad object and purpose of the Specific Claims Policy, the most reasonable interpretation of "lawful obligation" is that it includes claims based on a breach of fiduciary obligation. The preamble to the definition of "lawful obligation" in *Outstanding Business* states that:

> The government has clearly established that its primary objective with respect to specific claims is to discharge its *lawful obligation as determined by the courts* if necessary. Negotiation, however, remains the preferred means of settlement by the government, just as it has been generally preferred by Indian claimants. In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.[165]

When the policy was published in 1982, the Supreme Court of Canada in *Guerin v. The Queen* had not yet recognized breach of fiduciary duty as a separate cause of action in the context of the Crown-aboriginal relationship. It is therefore understandable that fiduciary duty was not expressly referred to in the policy. However, the policy defines "lawful obligation" as "an obligation derived from the law on the part of the federal government." It is now well settled that the Crown's fiduciary relationship with First Nations can provide a distinct source of legal or equitable obligation.

Since Canada intended to create a process that would allow it to settle specific claims without the involvement of the courts, it stands to reason that the four delineated examples of "lawful obligation" were not intended to be exhaustive. They are simply illustrations of the types of claims that can be dealt with under the Policy. Two notable exceptions are expressly excluded under the Policy: (1) claims based on unextinguished native (or aboriginal) title; and (2) claims based on events prior to Confederation in 1867. Since 1991, however, Canada has allowed pre-Confederation claims under the Policy.

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[164] ICC, *'Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 96-97, 100.

[165] *Outstanding Business*, 19.

Therefore, a claim falls within the Specific Claims Policy if (1) it is based on a cause of action recognized by the courts; (2) it is not based on unextinguished aboriginal rights or title; and (3) it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy. If these conditions are met, Canada should consider the claim under the Policy in the interests of avoiding protracted, costly, and adversarial court actions. Given our conclusion in Issue 1 that Agent Halliday breached his fiduciary obligation to the Band, we find that this claim fits within the parameters of the Specific Claims Policy.

PART V

FINDINGS AND RECOMMENDATIONS

FINDINGS

We have been asked to inquire into and report on whether the Government of Canada properly rejected the McKenna-McBride Applications Claim submitted by the 'Namgis First Nation. In assessing the validity of this claim for negotiation under Canada's Specific Claims Policy, we have considered a number of specific legal and factual issues. Our findings can be summarized as follows:

Fiduciary Duty prior to the McKenna-McBride Hearings

- The Band has a valid specific claim if it can establish a *prima facie* case that (1) the Indian Agent failed to prepare the Band for the McKenna-McBride process; (2) unalienated lands were available which the Band could have applied for; and (3) the lands were reasonably required by the Band. If these conditions are satisfied, it should be presumed that the Commission would have allotted the lands as additional reserve lands. Although the presumption is rebuttable, the onus should be on Canada to demonstrate on a balance of probabilities that the McKenna-McBride Commission would not have allotted the lands as additional reserve lands if the lands had been requested by the Band.

- In the circumstances of this claim, we are satisfied that Agent Halliday failed to disclose material information and to provide basic advice to the Nimpkish Band to assist it in its preparations for the McKenna-McBride hearings. Although this information was readily available to Agent Halliday and would not have been an onerous task on his part, he offered little or no information to the Band to assist it during this important process. This failure was evident from the words of both Chief Willie Harris, at the general meeting of the principal tribes on June 1, 1914, and the Chairman of the McKenna-McBride Commission, who noted that the plans of the Chiefs' lands were "lying in the office of the Indian Agent who failed to distribute them . . . as ought to have been done."

- We are also satisfied that additional lands were reasonably required by the Band. Compared with a per capita average of 14.03 acres for the Kwawkewlth Agency as a whole, the Nimpkish had a per capita average of only 4.2 acres, even after receiving 70 additional acres in the Plumper Island group and 60 additional acres in the Pearse Island group. Considering that the Nimpkish Band "was one of the few in the Agency increasing numerically . . . and required room for expansion," it seems reasonable to conclude that the Band was left with insufficient lands.

- It is unclear, however, whether there were unalienated lands available in 1914 which the Band could have applied for. Since, on the evidence before us, the Band has not established a *prima facie* case that such lands were available, in our view it has not established that it has a valid specific claim on this basis. If supplementary research can confirm that such lands were available in 1914, it should be presumed that the McKenna-McBride Commission would have allotted additional reserve lands. Although it is not clear how much land the Commission would have allotted to the Band in 1914, this is a matter which could provide a valid basis for negotiations under the Specific Claims Policy.

Fiduciary Duty during the McKenna-McBride Hearings

- The Band has a valid specific claim if it can establish a *prima facie* case that (1) a reasonable person acting in good faith would have provided a different recommendation to the Commission than that provided by the Indian Agent if that person had consulted with the Band and made other appropriate investigations; and (2) the relevant lands were unalienated. If these conditions are satisfied, it should be presumed that the Commission would have allotted some or all of the lands encompassed by that different recommendation, providing that the lands were reasonably required by the Band. The onus is on Canada to rebut the presumption on a balance of probabilities.

- If Agent Halliday had consulted with the Band before making his recommendations to the Commission, he would have discovered that all the lands encompassed by Application 76 (the Plumper Islands) and Application 77 (the Pearse Islands) were actively used by the Band and were of importance to them. Therefore, a reasonable person acting in good faith would have recommended for reserve status all the islands requested by the Band. According to the notations made by the Commission, all the lands encompassed by Application 76 were "open and available." Accordingly, it should be presumed that the Commission would have allotted some or all of the two Plumper islands that were not included in its final decision. The Commission's notations with respect to Application 77 state that the lands were "*partially* open and available." Again, the Band has not provided sufficient evidence that the particular lands sought in its specific claim in relation to Application 77 were unalienated. This is a necessary pre-condition before it can be presumed that the Commission would have allotted some or all of the lands as additional reserve lands.

- Given the evidence of Chief Lageuse that the area around Woss had not been used for a number of years, a reasonable person acting in good faith might have made the same recommendation as Agent Halliday in relation to Application 73 if it was absolutely clear that the Commission would allot the lands sought under Application 72 to extend the area of Indian Reserve 3. However, this outcome was not at all clear, since the lands requested under Application 72 were covered by a timber limit. The area around Woss was an old village site, important for food gathering and trade, and significant in terms of 'Namgis culture and traditions, so it is a reasonable likelihood that the Band would have used the area since it was unable to obtain the lands sought under Application 72. Therefore, a reasonable person acting in good faith would have recommended Application 73 at Woss in addition to, or at least in the alternative to, Application 72. However, it is unclear whether the lands encompassed by Application 73 were unalienated. If it can be shown that the lands were unalienated, it should be presumed that the Commission would have allotted some or all of them as additional reserve lands.

Fiduciary Duty after the McKenna-McBride Hearings

- Agent Halliday had the same fiduciary obligation at this stage of the process as he had during the hearings; that is, he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission.

- Agent Halliday knew at the time he was making his revised recommendations that the Commission was unwilling or unable to allot the lands encompassed by Application 72. Since Agent Halliday believed that the Band required room for expansion, a reasonable person would have attempted to match as closely as possible the lost acreage from Application 72 (500 acres). In terms of the Band's original applications, this acreage would have required a revised recommendation that included all or most of Applications 73, 76, and 77, depending on the total acreage in the Plumper and Pearse Island groups. Therefore, it should be presumed that the Band has a valid claim for negotiation with respect to Application 76 since the lands were "open and available." The same should be presumed with respect to Applications 73 and 77 if the Band can provide evidence that the lands sought in its specific claim were unalienated.

- It is unnecessary for us to decide whether Agent Halliday was restricted to the original applications of the Band when he made his revised recommendations, for any such restriction would simply return us full circle to his obligation to prepare the Band for the process. If the Band had been properly prepared for the process and had asked for more available lands, Agent Halliday would have had a larger land base from which to make his revised recommendations.

Fiduciary Duty of the McKenna-McBride Commission and Its Agents

- Given the independent nature of commissions of inquiry, the reasoning of Mr. Justice Iacobucci in *Quebec (A.-G.) v. Canada (National Energy Board)*

(1994), 112 DLR (4th) 129 (SCC), can logically be extended to a commission such as the McKenna-McBride Commission. Therefore, the McKenna-McBride Commission and its agent, Mr. Ashdown Green, did not owe a fiduciary duty to the Band.

Scope of the Specific Claims Policy

- The four enumerated circumstances of "lawful obligation" on page 20 of *Outstanding Business* are only examples of Canada's lawful obligations and are not intended to be exhaustive. More specifically, Canada's fiduciary obligations are "lawful obligations" within the meaning of the Policy.

- A claim falls within the Specific Claims Policy (1) if it is based on a cause of action recognized by the courts; (2) if it is not based on unextinguished aboriginal rights or title; and (3) if it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy. If these conditions are met, Canada should consider the claim under the Policy in the interests of avoiding protracted, costly, and adversarial court actions.

- Given our conclusion in Issue 1 that Agent Halliday breached his fiduciary obligation to the Band, we find that this claim fits within the parameters of the Specific Claims Policy.

RECOMMENDATIONS

We therefore make the following recommendations to the parties:

RECOMMENDATION 1

> **That the McKenna-McBride Applications Claim of the 'Namgis First Nation, with respect to lands included in Application 76 only, be accepted for negotiation under the Specific Claims Policy.**

RECOMMENDATION 2

> **That the 'Namgis First Nation's claims related to Applications 73 and 77 not be accepted for negotiation under the Specific Claims Policy.**

RECOMMENDATION 3

> **That the 'Namgis First Nation and Canada conduct further research to determine whether there were unalienated lands available which the Band could have applied for during the 1914 McKenna-McBride hearings. Specific research should also be conducted with respect to lands included in Applications 73 and 77 to determine whether such lands were unalienated and available. At the request of the parties, the Commission is willing to offer its assistance in the completion of additional research.**

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC **Commission Co-Chair**	**Daniel J. Bellegarde** **Commission Co-Chair**	**Aurélien Gill** **Commissioner**

APPENDIX A

'Namgis First Nation McKenna-McBride Applications Claim Inquiry

1 Decision to conduct inquiry — March 2, 1995

2 Notices sent to parties — March 3, 1995

3 Planning conference — January 31, 1995

4 Community session — April 20 and 21, 1995

The Commission heard from the following witnesses: Mary Hanuse, Ethel Alfred, Peggy Svanvik, George Cook, Bill Cranmer, Agnes Cranmer. The session was held at the U'mista Cultural Centre, Alert Bay, BC.

5 Legal argument — September 20, 1995

6 Content of the formal record

The formal record of this inquiry is comprised of the following:

- Documentary record (1 volume of documents)
- 6 exhibits
- Transcripts (3 volumes, including the transcript of legal submissions)

The report of the Commission and letters of transmittal to the parties will complete the record of this inquiry.

APPENDIX B

THE POTLATCH AND INDIAN AGENT HALLIDAY

The potlatch was, and remains, a central part of the culture and traditions of many native societies along British Columbia's northwest coast. In addition to feasts, dancing, and songs, one of the key elements in the ceremony was the exchange of gifts and the redistribution of property. Indian Agents and missionaries expressed concerns about the perceived negative effects of the potlatch and the distribution of great wealth in ceremonies that could be up to five months in duration.[1] As a result of these views and the perceived evils of the ceremony, the federal government outlawed the potlatch in 1884. Attempts were made to prosecute Indians for violating the potlatch law in the late 1880s and 1890s, but the charges were usually dismissed. By the turn of the century, however, the Department of Indian Affairs was exhibiting a renewed interest in eliminating the ceremony, an interest that coincided with the appointment of William Halliday as Indian Agent to the Kwawkewlth Agency in 1906.

Like many of his contemporaries, Agent Halliday was opposed to the potlatch. In his memoirs, he described the potlatch as a "particularly wasteful and destructive custom, and [sic] created ill-feeling, jealousy and in most cases great poverty." He commented that the "good obtained from it was small, and the evils associated with it were so great."[2] On other occasions, Halliday complained to his superiors that the potlatch was "the great stumbling block in the way of progress."[3]

Agent Halliday first attempted to enforce the potlatch law in 1913, one year before the McKenna-McBride Commission hearings at Alert Bay. He made a series of arrests, but, as in earlier attempts at enforcement, he was unable to secure a conviction. In the wake of this failure, he wrote to his superiors and expressed the opinion that "it would very much simplify matters if the Indian Agent would [sic] summarily deal with this indictable offence."[4] In 1918 the Department of Indian Affairs, under the control of Duncan Campbell Scott, acted on Agent Halliday's recommendation and amended the potlatch law to empower the Indian Agent as both judge and jury in cases involving potlatch trials.[5] Once he knew of his new, expanded powers, Agent Halliday adopted increasingly harsh methods of enforcement and punishment. A series of arrests and convictions followed which soured relations between Agent Halliday and the Indians of Alert Bay, including the Nimpkish.[6]

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[1] *Potlatch: A Strict Law Bids Us Dance*, 1975 (video produced by U'mista Cultural Centre).

[2] W.M. Halliday, *Potlatch and Totem and the Recollections of an Indian Agent* (Toronto: J.M. Dent and Sons Ltd., 1935), 4-5.

[3] Douglas Cole and Ira Chaikin, *An Iron Hand upon the People: The Law against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990), 95.

[4] Cole and Chaikin, *Iron Hand upon the People*, 101.

[5] Cole and Chaikin, *Iron Hand upon the People*, 103.

In 1919 Agent Halliday gained a powerful ally in the war against the potlatch. An RCMP detachment was posted to Alert Bay, and the sergeant in charge of the detachment, Ernest Angermann, was like Agent Halliday, a vehement opponent of the potlatch. The following year Sergeant Angermann made eight arrests related to the potlatch, all of which were tried before Agent Halliday. In each of these cases, Agent Halliday sentenced the convicted potlatch participants to two months' imprisonment, the minimum penalty for violating the law.[7]

In December 1921 Dan Cranmer, a high-ranking Nimpkish from Alert Bay, organized and held a potlatch. The ceremony was witnessed by Sergeant Angermann, who took careful note of the proceedings, and in February 1922, arrested 45 of the participants. Many of those arrested were high-born members of Nimpkish society. In the trial that followed, Agent Halliday acted as magistrate and found all 45 defendants guilty. Some of the sentences were suspended on condition that the potlatch participants and the villages they came from surrendered all their potlatch regalia and promised never to practise the potlatch again. Among those convicted, Agent Halliday sentenced 22 Indians to terms of two to six months to be served at Okala prison near Vancouver.[8]

In the wake of these arrests and convictions, Agent Halliday believed that he had all but succeeded in eradicating the potlatch among the Nimpkish. The confiscated materials, mainly ceremonial masks, costumes, and coppers, were put on display at Alert Bay. While on display, they were viewed by an American collector, who agreed to purchase 35 pieces of material for $291. The remainder were shipped to Ottawa, where they were ultimately sold to the Victoria Memorial Museum (now the Canadian Museum of Civilization) and the Royal Ontario Museum for $1456. Although the proceeds from the sale were deposited in the Band's trust account, the ceremonial coppers alone were estimated to be worth $36,000 by their original owners.[9]

There is no doubt that Agent Halliday's prosecution of the potlatch law was both rigid and severe. The more difficult question is whether Agent Halliday's fierce opposition to the potlatch had any bearing on his conduct in relation to the 'Na̲mgis applications for additional reserve land and the proceedings involving the McKenna-McBride Commission. Although Agent Halliday's enforcement of the potlatch ban undoubtedly soured relations between him and the people he was entrusted to represent, the fact that most of these prosecutions took place after the McKenna-McBride hearings in 1914 raises serious doubts about whether his rigorous efforts at enforcement had any direct bearing on his conduct during the Commission's hearings. In any event, since the Indian Claims Commission has found that Agent Halliday breached certain fiduciary duties owed to the 'Na̲mgis people which could lead to a valid claim on different grounds, it is not strictly necessary to consider whether Agent Halliday's enforcement of the potlatch law had a direct bearing on the McKenna-McBride hearings.

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[6] Cole and Chaikin, *Iron Hand upon the People*, 94-98.

[7] Cole and Chaikin, *Iron Hand upon the People*, 116

[8] *Potlatch: A Strict Law Bids Us Dance*, 1975.

[9] *Potlatch: A Strict Law Bids Us Dance*, 1975.